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No. 06-

IN THE

Supreme Court of the United States

JEFFREY DEVAN LEONARD,
Petitioner,

v.

THOMAS SIMPSON,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 2, 2007

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CAPITAL CASE

QUESTION PRESENTED

All of the federal judges below concluded that petitioner's counsel performed in a constitutionally deficient manner at petitioner's capital sentencing hearing. A divided panel of the Sixth Circuit nonetheless reversed the district court's grant of habeas relief on the ground that petitioner had failed to demonstrate prejudice under *Strickland v. Washington*. The Sixth Circuit then reached "a seven to seven stalemate" regarding the petition for rehearing en banc. The question presented is as follows:

Whether, as the Sixth Circuit has repeatedly held in conflict with the decisions of at least three other Circuits, a habeas petitioner cannot show prejudice under *Strickland* unless the evidence that competent counsel would have presented differs in a substantial way – in strength and subject matter – from the evidence actually presented at sentencing, so that the failure to present a constitutionally adequate mitigation case is excused because the jury heard aspects of that case in skeletal form, principally from the defendant himself.

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 24.1(b), the following identifies all of the parties before the United States Court of Appeals for the Sixth Circuit:

Jeffrey Devan Leonard was the appellee and cross-appellant below. In the proceedings thus far, Mr. Leonard was mistakenly identified as James Earl Slaughter, which is not his real name. Phil Parker, Warden for the Kentucky State Penitentiary, was appellant and cross-appellee below. Thomas Simpson is now the Warden for the Kentucky State Penitentiary, and thus he is named as respondent here.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 1

A. Introduction 1

B. Trial and Sentencing Proceedings 4

C. State Post-Conviction Proceedings 5

1. The Evidentiary Hearing 5

2. The Decision of the State Post-Conviction Trial Court 9

3. The Kentucky Supreme Court Post-Conviction Decision 10

D. District Court Proceedings 11

E. Sixth Circuit Proceedings 13

REASONS FOR GRANTING THE PETITION 17

CONCLUSION 30

Appendix A

Opinion, *Slaughter v. Parker*, No. 01-6359 (6th Cir. June 13, 2006) 1a

Appendix B

Memorandum Opinion and Order, *Slaughter v. Parker*, No. 3:00CV-P227-C (W.D. Ky. Sept. 27, 2001) 50a

Appendix C

Memorandum Opinion, *Slaughter v. Kentucky*, 96-SC-49-MR (Ky. April 22, 1999) 206a

Appendix D

Findings and Conclusions, *Kentucky v. Slaughter*, NO. 83CR0387 (D. Ky. Jefferson Cir. Ct. June 22, 1995) 225a

Appendix E

Opinion, *Slaughter v. Kentucky*, No. 84-SC-272-MR (Ky. Nov. 5, 1987) 231a

Appendix F

Denial of Rehearing, *Slaughter v. Parker*, No. 01-6359 (6th Cir. Nov. 1, 2006) 253a

Appendix G

Constitutional and Statutory Provisions Involved..... 259a

TABLE OF AUTHORITIES

CASES

Anderson v. Sirmons, 476 F.3d 1131 (10th Cir. 2007) 24

Bean v. Calderon, 163 F.3d 1073 (9th Cir. 1998)..... 24

Broom v. Mitchell, 441 F.3d 392 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 1376 (2007) 14, 18, 26

Brown v. Myers, 137 F.3d 1154 (9th Cir. 1998) 25

Buckner v. Polk, 453 F.3d 195 (4th Cir. 2006), *cert. denied*, __ S. Ct. __, 2007 WL 73617 (U.S. Mar. 19, 2007) 20

Cargle v. Mullin, 317 F.3d 1196 (10th Cir. 2003) 26

Clark v. Mitchell, 425 F.3d 270 (6th Cir. 2005)..... 14, 18

Clemons v. Mississippi, 494 U.S. 738 (1990) 27

Daniels v. Woodford, 428 F.3d 1181 (9th Cir. 2005), *petition for cert. filed*, 75 U.S.L.W. 3457 (U.S. Feb. 14, 2007) (No. 06-1142)..... 27

Douglas v. Woodford, 316 F.3d 1079 (9th Cir. 2003) 24

Eddings v. Oklahoma, 455 U.S. 104 (1982)..... 19, 27

Foster v. Johnson, 293 F.3d 766 (5th Cir. 2002) 21

Hall v. Head, 310 F.3d 683 (11th Cir. 2002) 22

Hill v. Mitchell, 400 F.3d 308 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 744 (2005) 14, 18, 28

Hovey v. Ayers, 458 F.3d 892 (9th Cir. 2006)..... 24

Jacobs v. Horn, 395 F.3d 92 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 479 (2005) 23

Jermyn v. Horn, 266 F.3d 257 (3d Cir. 2001)..... 23

Marshall v. Cathel, 428 F.3d 452 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1587 (2006) 23

Mathis v. Dretke, 124 Fed. Appx. 865 (5th Cir. 2005), *cert. denied*, 545 U.S. 1131 (2005) 21

Mayfield v. Woodford, 270 F.3d 915 (9th Cir. 2001).. 23, 26

McHone v. Polk, 392 F.3d 691 (4th Cir. 2004), *cert. denied*, 126 S. Ct. 94 (2005) 20

Moody v. Polk, 408 F.3d 141 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1060 (2006) 21

Moore v. Parker, 425 F.3d 250 (6th Cir. 2005), *cert. denied*, 127 S. Ct. 557 (2006) 14, 18

Neal v. Puckett, 286 F.3d 230 (5th Cir. 2002) 21

Outten v. Kearney, 464 F.3d 401 (3d Cir. 2006)..... 22

Penry v. Lynaugh, 492 U.S. 302 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002) 19, 27

Rompilla v. Beard, 545 U.S. 374 (2005)..... 17, 18, 28

Skipper v. South Carolina, 476 U.S. 1 (1986)..... 16, 25

Smith v. Mitchell, 348 F.3d 177 (6th Cir. 2003)..... 18

Smith v. Mullin, 379 F.3d 919 (10th Cir. 2004) 24

Stankewitz v. Woodford, 365 F.3d 706 (9th Cir. 2004)..... 23

Strickland v. Washington, 466 U.S. 668 (1984) 3, 4, 10, 11, 17

Tennard v. Dretke, 542 U.S. 274 (2004)..... 27

United States v. Gleason, 616 F.2d 2 (2d Cir. 1979) 25

Wiggins v. Smith, 539 U.S. 510 (2003) 13, 16, 17, 28

Williams v. Taylor, 529 U.S. 362 (2000) .. 12, 16, 18, 28, 29

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(d) 11, 12, 13

MISCELLANEOUS

Andrew Wolfson, *Radolovich to Give Up License: Perjury Charge Came in Death-Penalty Case*, The Courier-Journal, Feb 6, 2007, at http:// www.courier-journal.com/apps.pbcs.dll/article?AID=20077020606 0446..... 6

PETITION FOR WRIT OF CERTIORARI

Petitioner Jeffrey Devan Leonard respectfully requests this Court to issue a writ of certiorari to review a decision of the United States Court of Appeals for the Sixth Circuit.[1]

OPINIONS BELOW

The decision of the Sixth Circuit is reported at 450 F.3d 224, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a. The Sixth Circuit's order denying rehearing and rehearing en banc is reported at 467 F.3d 511, and is reprinted at Pet. App. 253a. The decision of the U.S. District Court for the Western District of Kentucky is reported at 187 F. Supp. 2d 755, and is reprinted at Pet. App. 50a.

JURISDICTION

The Sixth Circuit issued the decision denying rehearing and rehearing en banc on November 1, 2006. Pet. App. 253a. Justice Stevens extended the time for filing the petition for certiorari to March 31, 2007 (No. 06A716). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reproduced at Pet. App. 259a.

STATEMENT OF THE CASE

A. Introduction

This petition seeks review of what five judges of the Sixth Circuit decried as a "new chapter in our death penalty

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[1] Petitioner was tried below under the name James Earl Slaughter. His real name is Jeffrey Devan Leonard, a fact that his trial counsel failed to discover. The petition refers to Mr. Leonard by his real name throughout.

jurisprudence," Pet. App. 254a: a case in which "a 20-year old, African American male with no prior violent felony history was sentenced to death by a jury that did not know his true background, family and social history, or even his true name." Pet. App. 196a.

The federal judges below all agreed that petitioner Jeffrey Leonard received shockingly inadequate representation at his capital sentencing hearing. Leonard's trial counsel admitted that he did nothing to prepare for sentencing beyond making a single phone call to one of Leonard's distant relatives. The entire mitigation case comprised testimony from a state-appointed psychologist (who had examined Leonard not for purposes of aiding the defense but at the request of the trial court to assess his competency to stand trial) and from Leonard himself. State post-conviction proceedings revealed, however, that a powerful mitigation case was readily available had counsel made even minimal efforts to develop it. At the state post-conviction hearing, Leonard's mother, brothers, and other relatives – none of whom counsel had contacted for trial – described a nightmarish childhood of physical abuse and privation, and provided passionate pleas to spare Leonard's life. In addition, independent mental health experts provided testimony establishing both that the State's psychologist's negative evaluation of Leonard was medically insupportable and that Leonard suffered from a cognitive disorder due to a childhood brain injury, as well as a paranoid personality disorder resulting from his difficult upbringing. On the basis of the evidence that Leonard's trial counsel failed to develop and introduce, the federal district court granted habeas relief on Leonard's Sixth Amendment claim and ordered a new sentencing proceeding.

A divided Sixth Circuit panel reversed. The panel unanimously held that trial counsel's performance was woefully inadequate under the standards for attorney

performance set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and that the contrary decision of the Kentucky courts was unreasonable. Pet. App. 12a-13a. In the Sixth Circuit, however, for a petitioner to demonstrate *Strickland* prejudice, he must present evidence that differs in a substantial way – in strength and subject matter – from the evidence presented at the flawed sentencing hearing. Because the sentencing jury learned some of Leonard's personal history from Leonard himself, and because the state-appointed competency expert testified about Leonard's mental and emotional condition, the panel majority held that Leonard failed to demonstrate prejudice.

Leonard then sought panel and en banc rehearing. Rehearing en banc was denied because the Sixth Circuit reached a "seven to seven stalemate regarding the en banc petition." Pet. App. 254a. Dissenting from the denial of review, Judge Cole (joined by four other judges) stated:

> We are uneasy about executing anyone sentenced to die by a jury who knows nearly nothing about that person. But we have allowed it. We are also uneasy about executing those who commit their crime at a young age. But we have allowed that as well. We are particularly troubled about executing someone who likely suffers brain damage. We rarely, if ever, allow that – especially when the jury is not afforded the opportunity to even consider that evidence. Jeffrey Leonard, known to the jury only as "James Slaughter," approaches the execution chamber with all of these characteristics. Reaching this new chapter in our death-penalty history, the majority decision cannot be reconciled with established precedent. It certainly fails the Constitution.

Id.

Plenary review is manifestly appropriate. The Sixth Circuit's insistence that the new evidence offered to demonstrate prejudice differ not just in degree but in kind from the evidence previously presented squarely conflicts with the law of at least three other Circuits, and reflects a persistent confusion in the Circuits regarding the proper analysis of prejudice under *Strickland*. The fate of Jeffrey Leonard should not depend on the happenstance of the Circuit in which he must raise his Sixth Amendment claims. Moreover, this is the time and the case for review. Because the deficient performance of trial counsel is manifest, the prejudice issue is squarely presented and, as the seven-to-seven stalemate in the Sixth Circuit suggests, the facts of this case provide an especially egregious illustration of the consequences of the Sixth Circuit's flawed standard.

B. Trial and Sentencing Proceedings

Jeffrey Leonard was convicted of capital murder and robbery in the first degree for a stabbing committed when he was 19 years old (he was 20 years old at the time of trial). He had no prior record of criminal violence. Pet. App. 196a.

At sentencing, the jury heard only testimony from Leonard himself and from Dr. Phillip Johnson, an employee of the Commonwealth who had previously prepared a court-ordered competency evaluation of Leonard. Trial counsel introduced Dr. Johnson's testimony even though Dr. Johnson had concluded in his earlier written report that petitioner suffered from borderline personality disorder (BPD) with antisocial traits, was prone to violence, and was an unlikely candidate for rehabilitation.

In his testimony during the sentencing hearing, Leonard sought to explain that he had acted only as an accomplice, that there had been no plan to murder the victim, and that the actual killing had been done by another person (whom petitioner identified as "Red"). Pet. App. 62a. He was,

however, unable to provide any corroborating information regarding the identity of this person. Pet. App. 160a-161a. Leonard also testified about his life history, stating that he had left home at age twelve to escape beatings by his mother, that he dropped out of school in the seventh grade, and that he had used illegal drugs for a long period of time prior to the murder. He also testified that he had led the nomadic existence of a drifter, supporting himself (and his drug habit) through purse snatching and car theft. Pet. App. 61a-62a.

Relying on the evaluations he had previously conducted to determine whether Leonard was competent to stand trial, Dr. Johnson testified that Leonard had BPD with antisocial traits. His assessment was that Leonard is predisposed to violence, is prone to gross errors in judgment resulting from a failure to appreciate the relationship between cause and effect, and has limited prospects for rehabilitation. Overall, Dr. Johnson described Leonard as a person who led a nomadic, lawless lifestyle who was likely to commit violence in the future. Pet. App. 62a-63a.

The jury found the existence of only a single aggravating factor – that the murder occurred in the course of a robbery. The jury nevertheless sentenced petitioner to death. On direct appeal, the Supreme Court of Kentucky affirmed. Pet. App. 231a.

C. State Post-Conviction Proceedings

1. The Evidentiary Hearing

Leonard filed a timely petition for post-conviction review. The state post-conviction court then held a three-day evidentiary hearing that focused on whether Leonard's trial counsel had provided effective assistance. Pet. App. 225a.

Evidence regarding trial counsel's performance. The evidence of deficient performance on the part of Leonard's trial counsel, Ferdinand Radolovich, was overwhelming.

Although petitioner had been tried, convicted, and sentenced under the name of James Earl Slaughter, petitioner's real name is Jeffrey Devan Leonard, a fact that trial counsel apparently failed to notice, even though petitioner's real name was contained in the prosecution's file and in the trial court record in four different places. Pet. App. 192a.

Radolovich testified at the hearing that he had substantial experience litigating capital cases, including four capital cases while employed as an assistant district attorney in New York. Pet. App. 64a. That testimony was false. In fact, Radolovich had no previous experience litigating capital cases. Radolovich was subsequently indicted for perjury on the basis of this false testimony, *see* Pet. App. 4a n.1, and he was eventually forced to surrender his license to practice law as part of a settlement of the perjury charges.[2]

Radolovich acknowledged at the hearing that he had devoted 99% of his effort to preparing for the guilt/innocence phase of the trial. He did not even begin to prepare for sentencing until after the jury returned a guilty verdict on the murder charge. The sum total of his preparation for the sentencing phase consisted of a single phone call to Leonard's elderly aunt. Although he concluded that the aunt's testimony would not be helpful, Radolovich never asked the aunt whether she knew of any other family or friends who might be able to provide information or testimony. Pet. App. 193a.

Beyond that single phone call, Radolovich did nothing. Although Leonard ultimately testified at sentencing in his own defense, Radolovich did not prepare him in advance for that testimony. Similarly, although Radolovich called Dr.

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[2] *See* Andrew Wolfson, *Radolovich to Give Up License: Perjury Charge Came in Death-Penalty Case*, The Courier-Journal, Feb 6, 2007, at http://www.courier-journal.com/apps.pbcs.dll/article?AID=200770206060446.

Johnson to testify, Radolovich did not prepare him in advance. Most of Dr. Johnson's testimony affirmatively harmed Leonard's prospects of avoiding death – as Radolovich later acknowledged, Pet. App. 64a-65a, and as would have been obvious from even a cursory review of Dr. Johnson's written competency evaluation. Radolovich made no effort to secure an independent expert who could provide mental health testimony in mitigation, a course of action that was not the result of reasoned strategic judgment, but instead reflected Radolovich's (erroneous) belief that funds were unavailable for that purpose. Pet. App. 197a. Finally, Radolovich made no effort to obtain Leonard's birth, school, or medical records. Pet. App. 65a.

Evidence regarding prejudice. Leonard's post-conviction counsel presented a wealth of evidence detailing the mitigation case that was readily available to competent trial counsel. Post-conviction counsel introduced testimony from Leonard's mother, two brothers, and other relatives who lived nearby in Louisville at the time of the trial, as well as the testimony of (among others) three psychologists and a social worker. Pet. App. 66a-70a.

The evidence provided by family members – all of whom testified that they would gladly have testified at the sentencing hearing had they been asked – documented a childhood of physical abuse and privation. Leonard's mother, Mary Moon, testified that she gave birth to petitioner when she was fifteen years old and unmarried. Petitioner's father was killed approximately one month after Leonard was born. Moon had two other sons by different fathers. One of her husbands, to whom she was married for more than seven years, was an abusive alcoholic. Moon left him after an incident in which he fired a shotgun at Leonard, then age eight, as Leonard ran out of the family home carrying his four-year-old brother. Pet. App. 67a.

To support her children, Moon worked two jobs and was typically absent from the home from 7:30 a.m. until 10 p.m. Most of the time the children had to fend for themselves. Moon admitted that she "whipped the devil out of my children" as a form of discipline. She also testified that when Leonard was five, he suffered a serious head injury, which was not properly treated. Pet. App. 67a-68a.

Two of Leonard's brothers provided further detail on their childhood circumstances, describing physical abuse that included routine beatings with electric cords, belts, braided switches, and brooms. Testimony at the hearing confirmed that Leonard had "scars over all his body," consistent with the beatings his family members had described. Pet. App. 40a-41a. One scar reflected a laceration so deep that it cut through the underlying muscle. *Id.* at 41a. The brothers' testimony also revealed that their mother would occasionally confine the younger children to their rooms with nothing to eat. Notably, and in sharp contrast with the picture painted at trial, petitioner would find ways to get food to them. *Id.* at 69a. All of the family members testified that they loved petitioner and did not wish to see him die. *Id.*

Dr. Eric Engum, a clinical psychologist, testified that he had performed a neuropsychological evaluation of Leonard. He diagnosed Leonard as having attention deficit disorder, along with difficulties in learning and acquiring new information. His specific diagnosis was "cognitive disorder, not otherwise specified." Pet. App. 70a. He determined that this cognitive disorder arose because of a depressed skull fracture that injured the right frontal lobe of Leonard's brain. Sixth Circuit J.A. 375-76. As confirmed by the testimony of Dr. Gary Kearl, a medical doctor, the failure to treat the depressed skull fracture could have resulted in brain damage and "subsequent decreased reasonability." Pet. App. 41a; Sixth Circuit J.A. 553.

The testimony of Dr. Engum directly refuted the negative evaluation of Leonard that Dr. Johnson had presented at sentencing. Dr. Engum administered the Minnesota Multiphasic Personality Inventory (MMPI), which he described as an absolute prerequisite to a competent forensic examination. Dr. Engum noted that Dr. Johnson was unable to administer the MMPI to Leonard, and instead relied on the Rorschach Ink Blot Test as a diagnostic tool. Dr. Engum explained that a Rorschach test would not provide a valid basis for Dr. Johnson's diagnosis of BPD with antisocial traits. Dr. Engum concluded that there was no basis for such a diagnosis, and he disputed Dr. Johnson's conclusion that Leonard was an unlikely candidate for rehabilitation. Another clinical psychologist, Dr. Eric Drogin, likewise testified that Dr. Johnson's analysis was insufficient to support his diagnostic conclusions. Pet. App. 74a.

Lane Veltkamp, a licensed clinical social worker who performed a psychosocial evaluation of Leonard, agreed that Leonard was capable of rehabilitation. She testified that Leonard's upbringing made Leonard extremely distrustful and unable to form close attachments to others. She also testified, however, that his emotional and psychological difficulties could be overcome with appropriate treatment. Pet. App. 74a.

2. The Decision of the State Post-Conviction Trial Court

The state post-conviction trial court described the mitigation case presented on Leonard's behalf as "impressive," and observed that "the court has never been presented at trial with such an accumulation of mitigating evidence during a penalty phase." Pet. App. 228a; *see also* 77a. Without specifically identifying the mitigating evidence it was purporting to consider, the court nevertheless concluded that petitioner was not entitled to relief because

> this court, also the trial judge, is not persuaded that Mr. Radolovich provided "ineffective assistance of counsel." Further, even raising the standard, the court is not persuaded that . . . the now mitigating evidence would have changed the jury's verdict; it may have, or not, but searching the corners of this judge's mind, there is the conclusion that the contention is based upon speculation.

Id. at 229a. The court did not cite *Strickland* or otherwise discuss this Court's relevant Sixth Amendment decisions.

3. The Kentucky Supreme Court Post-Conviction Decision

The Kentucky Supreme Court affirmed. Purporting to apply *Strickland*, the court held that Radolovich's failure to investigate his client's background and social history was not deficient performance because counsel's duty to investigate extends only to information the defendant provides. Pet. App. 209a-210a. The court also found no fault with Radolovich's failure to develop and present mitigating mental health testimony from an independent expert. Citing nothing in the evidentiary record, the court stated that "[b]ased on Dr. Johnson's report," which had addressed petitioner's competency to stand trial, "Radolovich could have reasonably determined that further evaluations could not assist [Leonard], and as a matter of trial strategy, decided to forgo these determinations." Pet. App. 212a.

Addressing prejudice next, the Kentucky Supreme Court acknowledged that the mental health testimony "presented some mitigating factors," but then held that it was not "convinced" that the mental health evidence presented at the hearing "would have swayed the jury to decide against the capital sentence" or would have "overcome the aggravating factors presented by the Commonwealth." Pet. App. 212a-213a. In rendering this judgment, the Kentucky Supreme

Court gave no indication that it considered the mitigating testimony regarding petitioner's abusive childhood. Like the post-conviction trial court, the Kentucky Supreme Court did not purport to determine whether there was a "reasonable probability" of a different sentencing outcome, as *Strickland* has long required. *See Strickland*, 466 U.S. at 694.

D. District Court Proceedings

Leonard filed a timely petition for habeas relief in the United States District Court for the Western District of Kentucky. Applying the clearly established Sixth Amendment law set forth in *Strickland* and the AEDPA standards set forth in 28 U.S.C. § 2254(d), the district court granted relief. Pet. App. 191a-204a.

The district court first held that the Kentucky Supreme Court's decision that Radolovich had provided competent representation was unreasonable under § 2254(d). The district court found no support in the case law for the Kentucky Supreme Court's holding that trial counsel had no duty to investigate beyond the specific information Leonard provided him. Pet. App. 191a-192a. The court pointed out that information provided to Radolovich made clear that his client's real name was Jeffrey Leonard, not James Earl Slaughter, and that Radolovich had not even noticed this fact, much less acted upon it in investigating his client's case. *Id.* The district court also held that the Kentucky Supreme Court's decision upholding Radolovich's choice to offer Dr. Johnson as a witness was unreasonable. As the district court pointed out, there was no record support for the Kentucky Supreme Court's conclusion that Radolovich had made a "strategic decision," based on Dr. Johnson's competency report, that developing further mental health testimony would have been fruitless. *Id.* at 197a.

Turning to the *Strickland* prejudice inquiry, the district court held that the Kentucky Supreme Court's decision was

unreasonable under § 2254(d) for two reasons. First, the state high court failed to consider *at all* the potential mitigating effect of testimony from petitioner's family regarding the abuse and privation that characterized his upbringing. *Cf. Williams v. Taylor*, 529 U.S. 362, 397 (2000) (holding that state supreme court prejudice determination was unreasonable because "it failed to evaluate the totality of the mitigating evidence – both that adduced at trial and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation"). Second, expert mental health testimony could have established that petitioner did not in fact suffer from borderline personality disorder with antisocial traits – as Dr. Johnson had testified – and thus did not pose the continuing threat to society that Dr. Johnson's flawed BPD diagnosis indicated. To the contrary, that expert testimony could have placed Leonard in a far more sympathetic light by explaining to the jury that Leonard's inability to find a productive place in society may have been the result of a serious but undiagnosed learning disability, and that he was quite capable of rehabilitation with proper treatment. Pet. App. 199a-202a. As the district court noted, the Kentucky Supreme Court simply "brushed aside all of the additional mitigating evidence" and "merely concluded, without elaboration, that the additional mitigating evidence would not have altered the outcome." Pet. App. 202a; *see id.* at 203a (Kentucky Supreme Court acted unreasonably "because it fail[ed] to provide any analysis of the additional mitigating evidence or even to identify such evidence").

Summing up, the district court observed that the result of trial counsel's deficient performance was

> that the jury never saw Petitioner for whom he really was, not James Slaughter, a fictitious entity, but Jeffrey Leonard, a physically abused, neglected child, who was abandoned by his father and forced to care

> for his brothers; a child who, while innately intelligent, suffered from a significant learning disability that went undiagnosed throughout his childhood. The jury never learned that Jeffrey Leonard was an individual who, with proper treatment, was a good candidate for rehabilitation, who had loving family members who would stand by him and support him.
>
> Instead, they saw "James Earl Slaughter," in many senses, the man who never was, standing alone and defiant . . . . who apparently was so unloved and so uncared for that not a single individual relative or friend would vouch for him, though his life hung in the balance.

Pet. App. 201a-202a.

E. Sixth Circuit Proceedings

A divided panel of the Sixth Circuit reversed. In an opinion by Judge Batchelder, the majority agreed that trial counsel's performance had been deficient, and it held that the state court's contrary determination was unreasonable within the meaning of 28 U.S.C. § 2254(d). The majority recognized that Leonard's trial counsel did virtually nothing to prepare for the sentencing hearing. Pet. App. 12a. The majority also observed that the record contained no evidence that Radolovich made a strategic decision to forgo developing a mitigation case. Rather, the "failure to research Slaughter's history 'resulted from inattention, not reasoned strategic judgment.'" *Id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 526 (2003)).

Nevertheless, the majority denied relief on the ground that Leonard suffered no prejudice from his trial counsel's incompetent performance. Prior Sixth Circuit case law firmly established that, to show prejudice, "the new evidence

that a habeas petitioner presents must "*differ in a substantial way* – in strength *and subject matter* – from the evidence actually presented at sentencing." *Broom v. Mitchell*, 441 F.3d 392, 410 (6th Cir. 2006) (emphasis added) (quotation marks omitted); *see also Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005) (same); *Clark v. Mitchell*, 425 F.3d 270, 286 (6th Cir. 2005) (same); *Moore v. Parker*, 425 F.3d 250, 255 (6th Cir. 2005) (holding that because counsel introduced some family background evidence, there was no prejudice from failing to introduce additional evidence through a mitigation specialist). Consistent with that established principle, the majority held that even if Leonard's trial counsel had developed and presented graphic testimony from Leonard's family of the physical abuse, neglect, and privation that Leonard routinely suffered during his childhood, the evidence would not have made a difference because "[t]he jury heard such testimony from Slaughter himself." Pet. App. 13a-14a. The majority did not, however, attempt to compare petitioner's testimony at sentencing with the testimony his family members provided during post-conviction proceedings. In a similar vein, the majority dismissed as "speculation" the prospect that the jury would have been influenced by pleas from Leonard's family asking that his life be spared. *Id.* at 14a.

The majority also concluded that the failure to retain an independent mental health expert did not prejudice Leonard because the expert testimony introduced at the post-conviction hearing was "largely the same" as that provided at the sentencing hearing. *Id.* The majority did not explain its reasons for rejecting the district court's conclusion that the post-conviction expert testimony in fact refuted Dr. Johnson's harmful diagnoses of Leonard and exposed multiple errors in his methods. In other words, the majority did not evaluate whether the *absence* of Dr. Johnson's harmful diagnosis of BPD with antisocial traits, and Dr.

Johnson's attendant harmful testimony about petitioner's alleged violent predisposition, might have made a difference in the sentencing outcome. Nor did majority explain why it considered irrelevant post-conviction testimony establishing a cognitive disorder, likely brain damage, the link between Leonard's upbringing and his paranoid mental condition, and Leonard's his prospects for rehabilitation – none of which was covered in Dr. Johnson's initial sentencing testimony.

Judge Cole dissented. After detailing the wealth of mitigating information that had been provided at the state sentencing hearing, Judge Cole concluded that there was a reasonable probability that the outcome of Leonard's sentencing would have been different had the additional mitigation evidence been presented. Judge Cole rejected the majority's view that the absence of testimony from Leonard's family would not have made any difference simply because the jury had heard similar testimony from Leonard himself. Instead, Judge Cole noted that the additional testimony provided a more comprehensive picture of Leonard's difficult childhood and painted him in a far more sympathetic light than had his own testimony. Pet. App. 43a. And "perhaps most importantly, the jury was deprived of the opportunity to observe that, despite this abuse, [Leonard's] family cared about him deeply." *Id.* at 33a.

Judge Cole also pointed out that the expert testimony adduced in post-conviction proceedings differed in critical respects from Dr. Johnson's testimony. Perhaps most importantly, the new expert testimony *refuted* the most damaging point made by Dr. Johnson: his diagnosis of BPD with antisocial traits. It was that diagnosis that led Dr. Johnson to conclude that petitioner would likely persist in a nomadic and lawless existence, was prone to violence, and was an unlikely candidate for rehabilitation. Dr. Johnson did not discover what the post-conviction expert testimony

revealed: Leonard suffered from a cognitive disorder due to a childhood brain injury to his right frontal lobe and a paranoid personality disorder due to his troubled upbringing. Judge Cole thus concluded that, "[c]ontrary to the majority's opinion, the evidence presented at the hearing is not only overwhelming, but is substantively more comprehensive than (and in many instances conflicts with) that presented during Slaughter's penalty phase." Pet. App. 43a.

Leonard then sought panel and en banc rehearing. Rehearing was denied because the Sixth Circuit reached a "seven to seven stalemate regarding the en banc petition." Pet. App. 254a. Judge Cole, joined by four other judges, wrote a vigorous dissent from the denial, reasoning that the majority's decision "conflicts with" decisions such as *Wiggins v. Smith* and *Williams v. Taylor*, in which this Court found prejudice "although some mitigating evidence was presented [to the jury]." Pet. App. 256a. He also criticized the panel's determination that the testimony of petitioner's family was redundant of petitioner's own testimony, and that the "defendant's self-serving testimony – even when he testifies to spare his own life – has the same impact regardless of whether other witnesses corroborate it." *Id.* (citing *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986)).

The five dissenting judges concluded:

> It is no surprise that the jury sentencing "James Earl Slaughter" – an apparent menace with no redeeming qualities and not even a single family member to suggest his life should be spared – felt compelled to sentence him to death. Although we cannot be absolutely certain that a single juror sentencing Jeffrey Leonard – a likely brain-damaged man whose family would corroborate his testimony and plead for his life – would come to a different conclusion, this

> Court's decision leaves one aspect of this case indisputable: We will never know.

Pet. App. 258a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's stringent test for proving prejudice under *Strickland* merits this Court's immediate review. Clearly established law requires a defendant to demonstrate only "a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. As this Court has repeatedly emphasized, the impact of the undiscovered mitigation evidence must be "taken as a whole," *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) (quoting *Wiggins*, 539 U.S. at 538). A court adjudicating a claim of ineffective assistance of counsel must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534.

The Sixth Circuit has recast that *Strickland* standard to require that evidence presented to demonstrate prejudice must differ in a substantial way – in strength *and subject matter* – from the evidence actually presented at sentencing. *See infra* p. 18. That standard, in addition to being squarely at odds with this Court's clearly established law, conflicts directly with decisions of the Third, Ninth, and Tenth Circuits. Had Leonard's Sixth Amendment claim been adjudicated in one of those Circuits, Leonard would have prevailed: the skeletal mitigation case comprising limited testimony from Leonard himself and from a state expert hired to evaluate his competence to stand trial would not have sufficed to negate the mitigating force of comprehensive testimony of family members and independent experts concerning his childhood and his mental health. In contrast, the Sixth Circuit's approach parallels that taken by the Fourth

and Fifth Circuits, and thus the result in those Circuits would likely have been the same as the result here.

That kind of outcome-determinative difference in the governing legal standard on a matter of such fundamental importance is intolerable. It is particularly so here because the approach taken by the Sixth Circuit (and the Fourth and Fifth Circuits) is at odds with decisions of this Court in *Rompilla*, 545 U.S. at 390, and *Williams*, 529 U.S. at 397-98. Indeed, this Court's intervention is urgently needed. The question presented recurs frequently, and the need for a uniform national rule is apparent. Moreover, the question is cleanly presented in this case. Unlike other cases presenting questions of the appropriate standard for assessing *Strickland* prejudice, this case does not involve any additional close question regarding the adequacy of trial counsel's performance. Because that performance was unquestionably deficient, there is no impediment to the Court in reaching and deciding the prejudice issue. And because the Commonwealth's case in aggravation was comparatively weak, there is little prospect that the Court could conclude that full consideration of the additional mitigation evidence would not have changed the outcome under the appropriate *Strickland* prejudice standard.

1. In case after case applying *Strickland*, the Sixth Circuit has held that "to establish prejudice, the new evidence that a habeas petitioner presents must *differ in a substantial way* – in strength *and subject matter* – from the evidence actually presented at sentencing." *Broom*, 441 F.3d at 410 (emphasis added); *Hill*, 400 F.3d at 319 (same); *Clark*, 425 F.3d at 286 (same); *see also Smith v. Mitchell*, 348 F.3d 177, 200-02 (6th Cir. 2003); *Moore*, 425 F.3d at 255. The Sixth Circuit's *Strickland* prejudice inquiry thus begins and ends with the following question: has some subset of the newly available mitigating evidence previously found its way to the jury's

ears in some skeletal fashion? If the answer to the question is yes, the court does not give any mitigating weight to the remaining available evidence. And that is so even in cases where trial counsel failed to present more powerful or persuasive evidence regarding a defendant's abusive upbringing, his mental illness, his cognitive capacity, or other considerations that bear directly on the "reasoned moral response" a sentencer has a constitutional duty to render in a capital sentencing proceeding. *See generally Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982) (full consideration of an offender's life history is a "constitutionally indispensible part of the process of inflicting the penalty of death").

Applying the constricted Sixth Circuit approach to prejudice, the panel majority held that Leonard could not show prejudice from failure to obtain and present family members' testimony regarding his difficult childhood because "the jury heard such testimony from Slaughter himself." Furthermore, the panel ignored expert testimony that demonstrated the falsity of the only assessment of petitioner's mental health offered to the jury at sentencing. Even more egregiously, the panel treated Dr. Johnson's harmful and false testimony that petitioner suffered from BPD with anti-social traits as if it merely restated the evidence adduced in the post-conviction proceedings. In reality, the post-conviction expert testimony presented an entirely different picture, and specifically established that Leonard's childhood head trauma triggered his cognitive dysfunction and could have damaged the right frontal lobe of his brain. Expert testimony also confirmed Leonard's account of a horrific childhood of physical abuse and neglect.

2. Like the Sixth Circuit, the Fourth and Fifth Circuits routinely refuse to credit mitigating evidence as sufficient to establish prejudice under *Strickland* unless that evidence is

materially different, in strength *and subject matter*, from the evidence actually presented at trial. In these Circuits a bare-bones outline of a defendant's history is deemed an acceptable substitute for the detailed presentation of the mitigation case that a defendant has the constitutional right to present. In *Buckner v. Polk*, for example, although trial counsel "portrayed Buckner as the product of a troubled home, whose father had a history of alcohol abuse and whose brother died in a house fire when Buckner was young," 453 F.3d 195, 205 (4th Cir. 2006), counsel had failed to show that these circumstances had affected the defendant adversely, and the mental health evidence at sentencing made no mention of these circumstances. *Id.* at 210-11 (Gregory, J., concurring in part and dissenting in part). During post-conviction proceedings, Buckner introduced evidence from a mitigation expert describing his home life as "severely dysfunctional" and concluding that the fire and his father's alcoholism had caused him to develop post-traumatic stress disorder. *Id.* at 212-13. He also introduced a psychologist's affidavit to the same effect, as well as a psychiatrist's affidavit concluding that the defendant had the emotional maturity of a twelve-year-old – a condition that, in the psychiatrist's view, had "contributed materially" to his involvement in the crimes for which he had been convicted. *Id.* at 213. The Fourth Circuit found no prejudice, stressing that "the proffered evidence . . . *differs primarily in degree rather than in kind* from the evidence that [trial counsel] presented." *Buckner*, 453 F.3d at 204 (emphasis added); *see also McHone v. Polk*, 392 F.3d 691, 709-10 (4th Cir. 2004) (finding no prejudice because affidavit submitted to post-conviction court, detailing defendant's dysfunctional childhood home environment, was "almost entirely cumulative with the testimony that [defense] counsel presented at trial"); *id.* at 731-32 (Gregory, J., dissenting) (emphasizing that counsel had presented "four total witnesses

during sentencing, two of whom barely knew McHone," such that counsel could not "rebut the assertion that McHone only had a somewhat troubling childhood"); *Moody v. Polk*, 408 F.3d 141, 153-54 (4th Cir. 2005).

The Fifth Circuit applies a similarly constricted prejudice analysis in which even a "skeletal" presentation of evidence precludes a prejudice finding. For example, in *Neal v. Puckett*, defense counsel presented only two mitigation witnesses, whose testimony comprised nine pages of the trial record: the defendant's mother, who "gave an overview of Neal's troubled background," and a psychologist who "testified about Neal's mental and emotional difficulties." 286 F.3d 230, 237 (5th Cir. 2002) (en banc). In post-conviction proceedings, Neal presented affidavits and reports from employees (including doctors) of a prison, a mental hospital, and a school for retarded children, all of which Neal had called home. The Fifth Circuit recognized that the additional evidence presented to the post-conviction court was "disturbing reading," *id.* at 238-39, and it recognized that the initial presentation of mitigating evidence was "skeletal." *Id.* at 244. Nevertheless, the Fifth Circuit upheld the state court's prejudice determination because, *inter alia*, "much of the mitigating evidence had already been presented to the jury albeit in an abbreviated form." *Id.* at 247; *see also Mathis v. Dretke*, 124 Fed. Appx. 865, 881 (5th Cir. 2005) (finding no prejudice from failure to introduce evidence of defendant's frontal lobe damage because counsel had presented evidence with the same "mitigating thrust"); *Foster v. Johnson*, 293 F.3d 766, 783-84 (5th Cir. 2002) (failure to introduce certain "family background" evidence did not warrant finding of prejudice because jury had already been

presented with evidence of, *inter alia*, defendant's age, lack of criminal history, and poor educational background).[3]

3. In sharp contrast, the Third, Ninth, and Tenth Circuits have rejected any "different in kind" requirement. For example, in *Outten v. Kearney*, defense counsel elicited extensive testimony at sentencing regarding the defendant's troubled past, including "information regarding [his] substance abuse problem, truancy trouble in school, appearances in Family Court, criminal activity, and abusive and alcoholic father." 464 F.3d 401, 420 (3d Cir. 2006). The Third Circuit nonetheless rejected the State's argument that this bare-bones mitigation case foreclosed a defendant from showing prejudice by relying on a more extensive presentation of the same kind of evidence: "[s]imply because some mitigating evidence regarding [a defendant's] abusive childhood was introduced to the jury . . . it does not follow that the jury was provided a comprehensive understanding of [the defendant's] abusive [family] or other aspects of his troubled childhood." *Id.* at 421.

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[3] There is, at the very least, confusion in still other Circuits. In *Hall v. Head*, 310 F.3d 683, 702-03 (11th Cir. 2002), for example, the defendant Hall testified that he had enlisted in the Army, finished college, returned to the Army, and ultimately was promoted to first lieutenant. *Id.* 702-03, 705. In post-conviction proceedings, Hall argued that defense counsel was ineffective for not introducing detailed military records, which included (according to the Eleventh Circuit) "outstanding" evaluations," that noted among other things that Hall's "attitude is a model for his peers" and that Hall "was unselfishly giv[ing of] his time and talents for the betterment of the section and the accomplishment of the mission." *Id.* at (alteration in original; quotation marks omitted). The records also included a letter from a Command Sergeant Major stating that Hall was "to be commended, for no one else could have done [his job] so well." *Id.* In spite of all of this evidence, the Eleventh Circuit upheld the state court's prejudice determination, reasoning that the jury knew, from Hall's *own testimony*, that he "was performing well in the military," "had gone to college[, and] had never been arrested [or] convicted" previously. *Id.*

In a similar vein, in *Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001), trial testimony had revealed that the defendant was mentally ill and that his father beat him on a weekly basis. *Id.* at 304. The Third Circuit nonetheless rejected the state supreme court's holding that "[mitigation] evidence that could have been presented would simply have provided the jury with more detailed incidents of [the defendant's] childhood trauma and mental illness." *Id.* at 311 (internal quotation marks omitted). Rather, the court found *Strickland* prejudice because the jury did not hear "strong and specific testimony about a horrific home life in which Jermyn was physically and emotionally terrorized by his father." *Id.* at 310; *see also Marshall v. Cathel*, 428 F.3d 452, 473-74 (3d Cir. 2005); *Jacobs v. Horn*, 395 F.3d 92, 107 (3d Cir. 2005).

The Ninth Circuit employs the same approach. In *Mayfield v. Woodford*, 270 F.3d 915 (9th Cir. 2001) (en banc), the defense had offered mitigating testimony from a doctor regarding the defendant's family and childhood background, his health history, his psychiatric profile, his substance abuse, and a humanizing anecdote. *Id.* at 928. Despite recognizing that the "mitigation evidence presented at trial through the testimony of [the doctor] was substantial," *id.* at 929, the court found that the defendant suffered prejudice because the jury did not hear "experts in endocrinology and toxicology, or of friends and family members relating additional humanizing stories." *Id.* at 932. Similarly, in *Stankewitz v. Woodford*, 365 F.3d 706, 717-23 (9th Cir. 2004), the court of appeals found *Strickland* prejudice where the jury had heard a "summar[y]" of the defendant's "life chronology, starting from his suffering a severe beating at age six and continuing through his childhood placements in one state institution after another,"

but had not heard "the sort of detailed information" that came to light in post-conviction proceedings.[4]

The Tenth Circuit has taken the same tack. In *Smith v. Mullin*, 379 F.3d 919 (10th Cir. 2004), the jury had received "evidence of [the defendant's] impulsiveness and lack of emotional control." *Id.* at 941. The court nonetheless held that this mitigation case was "pitifully incomplete" and that the defendant was prejudiced by his sentencing counsel's failure to elaborate upon his "background, brain damage, and mental retardation." *Id.* at 944; *see also Anderson v. Sirmons*, 476 F.3d 1131, 1147 (10th Cir. 2007) (finding prejudice because "exceedingly limited" mitigation case based on testimony of defendant's family and co-workers did not canvass evidence of defendant's childhood abuse, brain damage, and drug abuse).

4. The unacceptable consequences of the Sixth Circuit's distorted understanding of *Strickland* are vividly illustrated here. The panel majority recognized that "[h]ad Radolovich located Slaughter's family, the jury would have heard testimony from Slaughter's mother, brothers, and grandparents that Slaughter was abandoned by his father, abused by his mother and step-father, and frequently left in charge of his siblings." Pet. App. 13a. As Judge Cole

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[4] *See also Hovey v. Ayers*, 458 F.3d 892, 926-30 (9th Cir. 2006) (finding prejudice even though the jury heard expert testimony that defendant suffered from schizophrenia; counsel failed to give the expert information that would have strengthened his diagnosis of schizophrenia and forestalled effective cross-examination by the prosecution); *Douglas v. Woodford*, 316 F.3d 1079, 1088-89 (9th Cir. 2003) (finding prejudice where general mitigation testimony was heard as to defendant's difficult childhood and good character but counsel failed to present more detailed evidence of those considerations, as well as evidence of defendant's alcohol abuse and brain damage); *Bean v. Calderon*, 163 F.3d 1073, 1080-81 (9th Cir. 1998) (finding prejudice where family portrait was an "unfocused snapshot" and other mitigating evidence was presented "only in the vaguest of terms").

observed and as described above, that evidence was powerful. Nonetheless, the panel gave it no weight in the prejudice analysis because "[t]he jury heard such testimony from Slaughter himself." *Id.* at 13a-14a. That is, because Leonard had testified about his own upbringing, the Sixth Circuit concluded that there was not even a reasonable probability that other people's testimony about that subject matter would have made a difference to the jury.

Both common sense and the law belie that result. First, it blinks reality to think that a jury, having just convicted a defendant of capital murder, will value that defendant's own testimony anywhere near as much as it will value testimony from people with only an indirect stake in the sentencing outcome. This Court has recognized, for example, that a defendant's own testimony in support of mitigation is "the sort of evidence that a jury naturally would tend to discount as self-serving," *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986), while "[t]he testimony of more disinterested witnesses . . . would quite naturally be given much greater weight by the jury," *id.* Thus, the Court held that it is "implausible" to characterize the testimony of disinterested witnesses as "cumulative" of the defendant's own mitigation testimony. *Id.*; *see also Brown v. Myers*, 137 F.3d 1154, 1157 (9th Cir. 1998) ("[defendant's] own testimony would have appeared more credible because it coincided in important respects with those of his alibi witnesses"); *cf. United States v. Gleason*, 616 F.2d 2, 15 (2d Cir. 1979) (approving jury instruction stating that a defendant "has a deep personal interest in the result of this prosecution[, which] creates, at least potentially, a motive for false testimony" and "is of a character possessed by no other witness" (quotation marks omitted)). But that "implausible" outcome is the exact result of the Sixth Circuit's approach.

Second, the Sixth Circuit's myopic focus on whether the evidence at the state post-conviction hearing was the same "kind" of evidence that was presented at trial caused the panel majority to lose sight of the powerful effect that the mere attendance of family members would have had on the jury. Even if the family members had merely recited the same testimony as petitioner – and they did not – their very presence as witnesses at the sentencing hearing would have served to humanize petitioner and send a message that his life was worth saving. Indeed, the *absence* of testimony from family members sends a damning message to the jury that the defendant is so evil that he has alienated even his own kin. The Sixth Circuit's characterization of this effect as "pure speculation" is at odds with that of other Circuits, which have recognized the powerful effect that such testimony – and the absence of such testimony – has on the jury. *See, e.g.*, *Cargle v. Mullin*, 317 F.3d 1196, 1210, 1222 (10th Cir. 2003) (finding prejudice where the "inescapable message sent to the jury was that no one who really knew the young man they had found guilty of murder — not parents, not family members, not friends — would take the stand to explain why his life was still worth saving"); *Mayfield*, 270 F.3d at 932 (en banc decision finding prejudice when jury did not hear "friends and family members relating additional humanizing stories"); *see also* Pet. App. 256a-257a (Cole., J., dissenting, joined by four Judges) (noting importance of testimony to rebut the impression that Leonard "was a man so loathed that nobody – not even his family – would corroborate his testimony or plead for his life").

Third, the panel ignored that although the post-conviction expert testimony related to the same "subject matter" as the testimony at sentencing, *Broom*, 441 F.3d at 410, the post-conviction evidence undermined and contradicted the mental health testimony that Dr. Johnson had presented to the jury: the post-conviction expert testimony demonstrated that

Leonard did not suffer from BPD with anti-social traits, that Leonard could be rehabilitated, and that Leonard had a cognitive disorder likely caused by a childhood head trauma that went untreated. Indeed, the testimony elicited by trial counsel painted an affirmatively *harmful* picture of Leonard by causing him to appear as a anti-social individual who would not be susceptible to rehabilitation. It is clear that such a lapse by counsel is prejudicial to the defendant. *See, e.g., Daniels v. Woodford*, 428 F.3d 1181, 1210 (9th Cir. 2005) (finding prejudice where sentencing counsel called an unprepared expert who wrongly suggested that the defendant was a sociopath).

5. The Sixth Circuit's insistence on evidence that is different in kind (and not just degree) cannot be reconciled with this Court's decisions. Evidence of a defendant's childhood abuse, mental illness, potential for rehabilitation, and family support provide the jury with the critical evidence needed to ensure, as the Constitution requires, that the punishment is "directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh*, 492 U.S. 302, 323 (1989); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004); *Clemons v. Mississippi*, 494 U.S. 738, 752 (1990). A capital sentencer must, therefore, be afforded the opportunity to assess "the character and record of the individual offender" as well as "the circumstances of the particular offense." *Eddings*, 455 U.S. at 112. The sentencer must do so "because of the belief, long held by society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse." *Penry*, 492 U.S. at 319.

Moreover, the presentation of some minimal level of mitigation evidence in a certain category does not render additional evidence of the same kind – but of a substantially

different degree – irrelevant. Instead, the jury must be allowed to see evidence allowing it to evaluate the full moral character and background of the defendant.

When a defendant has been deprived of competent counsel, he has lost the only mechanism for ensuring that the jury will offer a reasoned moral judgment in the capital sentencing proceeding. It is no surprise that this Court's decisions foreclose any requirement that mitigating evidence differ substantially "in strength and subject matter," *Hill*, 400 F.3d at 319, from the evidence that was actually presented, even when the newly available mitigation evidence reveals a wealth of relevant information. Pet. App. 13a-15a. In fact, this Court has repeatedly stated the opposite rule: the reviewing court must consider the impact of the undiscovered mitigation evidence "taken as a whole," *Rompilla*, 545 U.S. at 393 (quoting *Wiggins*, 539 U.S. at 538).

Williams v. Taylor, 529 U.S. 362 (2000), is directly on point. In *Williams* this Court found *Strickland* prejudice where the sentencing jury did not hear a "graphic description," *id.* at 398, of a defendant's abuse and neglect in childhood despite the fact that the defendant's mother, neighbors, and a psychiatrist testified at his sentencing and provided some evidence of that nature, *id.* at 369. And the Court reached that conclusion in the face of aggravation evidence that was far more damaging that the meager case in aggravation presented against Leonard in this case. As in *Williams*, the majority decision below "reveals an obvious failure to consider the totality of the omitted mitigation evidence." *Id.* at 416 (O'Connor, J., concurring in part and concurring in the judgment).

These holdings leave no room for doubt: a habeas court may not disregard or devalue undiscovered mitigation evidence merely because the jury was exposed to a bare-bones version of the mitigation case. That is all the more

true when the evidence actually presented involved the testimony of the defendant himself, which (as the Court recognized in *Skipper*) is the kind of testimony that benefits most from the corroboration and amplification that family members are uniquely situated to provide.

6. The time to review the question presented is now. The proper approach to determining prejudice under *Strickland* is unquestionably important. The question has the potential to arise in every capital case seeking to vindicate the right to effective assistance of counsel, and the divergent approaches of the various Circuits – including most of the Circuits with substantial death row populations – are well-articulated and deeply entrenched. As a result, federal habeas petitioners asserting ineffective assistance claims are subject to disparate treatment depending on the States in which they are convicted.

Further, this case is the ideal vehicle to decide the issue. Because even the panel majority agreed that counsel's performance was deficient, there are no obstacles to reaching the prejudice question. And there is little doubt that the Sixth Circuit's erroneous approach was outcome-determinative. For one thing, the State's case in aggravation was weak. Petitioner was only 19 years old at the time of the offense, he had no prior history of violence, and the jury found the existence of only a single aggravating factor: that the murder was committed in the course of a robbery. *Compare Williams*, 529 U.S. at 368-69, 396-98 (finding prejudice in the face of a far stronger case in aggravation).

Moreover, because of counsel's ineffectiveness, the jury heard only a tiny fraction of the available mitigation evidence. The powerful evidence presented at the post-conviction proceedings demonstrated that Leonard had endured a childhood of abuse and neglect, had sustained head trauma as a small child, and likely suffered from a

consequent cognitive disorder. Independent medical experts explained that rehabilitation was possible, and they rebutted the testimony of the sole medical expert who testified at the sentencing hearing. Moreover, family members were willing – indeed, eager – to testify on petitioner's behalf and to plead for his life. The picture presented to the jury, in short, was worse than incomplete. A process designed to encourage a "reasoned moral judgment" by the jury produced nothing of the sort, because the subject of that moral judgment was never shown to the jury – indeed, the jury never even knew his real name. There is, in short, no doubt that petitioner's Sixth Amendment claim would have been vindicated had it been judged under the prejudice analysis applied in the Third, Ninth, and Tenth Circuits and required by *Strickland* itself.

As Judge Cole's powerful dissents and the seven-to-seven stalemate on the petition for rehearing below demonstrate, the result in this case is a patent injustice. The jury was denied the evidence it needed to hear, and petitioner was denied his constitutional rights by the happenstance of geography. This Court should grant review to rewrite what would otherwise be a "new chapter in our death penalty jurisprudence." Pet. App. 254a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 2, 2007

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APPENDIX

Appendix A

United States Court of Appeals, Sixth Circuit.
James Earl SLAUGHTER,
Petitioner-Appellee/Cross-Appellant,
v.
Phil PARKER, Warden,
Respondent-Appellant/Cross-Appellee.
Nos. 01-6359, 01-6462.

Argued: Oct. 26, 2005.
Decided and Filed: June 13, 2006.

OPINION

ALICE M. BATCHELDER, Circuit Judge.

Respondent Phil Parker, a warden, appeals the district court's order granting James E. Slaughter, a.k.a. Jeffrey Leonard, a writ of habeas corpus on grounds of ineffective assistance of trial counsel. Slaughter, in turn, appeals the district court's denial of habeas relief on all other grounds asserted by Slaughter. For reasons explained below, we REVERSE the district court's grant of relief on the basis of ineffective assistance of counsel and we AFFIRM the district court's denial of relief on all other grounds.

1. *History of the case*

A. Conviction and appeal

The charges underlying Slaughter's convictions arose from the January 28, 1983, murder of Esther Stewart, a Kentucky resident who was stabbed to death at the "The Clothes Rack," a consignment store that she owned and operated. Slaughter

was arrested the day after the crime. His trial began on October 24, 1983, and the jury found Slaughter guilty of capital murder and robbery in the first degree. *Slaughter v. Commonwealth of Kentucky,* 744 S.W. 2d 407, 409 (Ky. 1988).

Slaughter's counsel called two witnesses to testify at the penalty phase of the trial: Slaughter and a state psychologist. Slaughter testified that his father died in 1972 while serving a prison sentence, and that he ran away from home at a young age to escape his physically abusive mother. *Slaughter v. Parker,* 187 F. Supp. 2d 755, 772 (W.D. Ky. 2001). He also testified, incorrectly, that his mother had died of cancer in 1980. Slaughter confessed to being a thief but blamed Stewart's murder on a man named "Red," a white male hitchhiker Slaughter claimed to have picked up prior to the robbery. According to Slaughter, before entering the Clothes Rack, he and Red agreed to exchange clothes. Shortly after Red entered the store, Slaughter heard a blood-curdling cry come from within the building. After Red emerged, he and Slaughter again switched clothes. Slaughter dropped Red off at an arcade and, although Red was never found, Slaughter was apprehended the next day. In summary, during the penalty phase of his trial, Slaughter refused to accept responsibility for the murder.

Dr. Phillip Johnson, a clinical psychologist employed by the Kentucky Correctional Psychiatric Center, also testified for Slaughter during the penalty phase. The court had retained Dr. Johnson to determine Slaughter's competency to stand trial, and on August 26, 1983, he filed a report concluding that Slaughter was, in fact, competent to stand trial. Based on his examination of Slaughter, Dr. Johnson testified that Slaughter suffers from a "border line personality disorder with anti-social traits." According to Dr. Johnson, people

with this disorder experience problems with their families, peers and occupations, and often struggle in school. He described Slaughter's problems as "moderate to severe across virtually every dimension" of life. Dr. Johnson opined that, if left to his own devices, Slaughter would not become a productive member of society. However, Dr. Johnson also stated that Slaughter would do better in highly structured situations, such as prison. While he could not guarantee that Slaughter would benefit from a treatment program, Dr. Johnson opined that rehabilitation was possible if Slaughter made a sincere effort to change his ways. Dr. Johnson also testified that Slaughter abused alcohol, amphetamines, hallucinogenic drugs, and marijuana. Because Slaughter's defense counsel never petitioned the court to appoint an independent expert, Dr. Johnson was the only expert witness to testify during the penalty phase.

Following closing arguments, the jury sentenced Slaughter to death for murder. Slaughter took a direct appeal to the Supreme Court of Kentucky, which rejected all of his arguments and affirmed his conviction and sentence. *See Slaughter v. Commonwealth,* 744 S.W.2d 407 (Ky. 1987). The United States Supreme Court denied certiorari on June 12, 1989. *See Slaughter v. Kentucky,* 490 U.S. 1113, 109 S. Ct. 3174, 104 L. Ed. 2d 1036 (1989).

B. Post-Conviction Proceedings

On October 13, 1989, Slaughter filed an RCr 11.42 motion to vacate, set aside or correct the judgment of conviction. The trial court held a three-day evidentiary hearing in September of 1994. Ferdinand Radolovich, Slaughter's defense attorney, was the first witness to testify. Radolovich testified that he had handled four capital trials when he was with the

District Attorney's Office in New York.[1] Radolovich also testified that he spent over 99% of the time that he devoted to Slaughter's case on the guilt phase of the trial and spent very little time preparing Slaughter for the penalty phase.

Radolovich testified that Slaughter had told him that he had no family, save his elderly aunt in Alabama. Relying on this information, Radolovich made no effort to research his client's family background. Radolovich contacted the aunt but did not ask her whether Slaughter had any surviving family members. Radolovich also contacted a number of Slaughter's friends and associates, none of whom had anything positive to say about Slaughter. Radolovich admitted to making no effort to pursue Slaughter's birth, school, or medical records.

Mary Moon, Slaughter's mother, also testified at the hearing. Moon stated that Slaughter had a turbulent childhood; that because Moon worked a lot, Slaughter frequently had to care for his younger siblings; and that both she and her husband beat Slaughter and his brothers. Moon also testified that Slaughter was very close to his late grandmother, whom he called once a week. Finally, Moon suggested that Slaughter lied about the death of his family members to protect his grandmother.

Bobby and Vincent Moon, Slaughter's half-brothers, also testified. Bobby corroborated his mother's testimony and

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[1] Radolovich's testimony about his background was false. The Executive District Attorney in New York County submitted an affidavit that revealed that Radolovich had worked for the office for less than a year and did not try any capital cases. Radolovich has subsequently been indicted for perjury in connection with the statements that he made at the hearing.

stated that Slaughter took care of him when Bobby was younger. Vincent testified that Slaughter once rushed him to the hospital when he was injured and would often sneak food to him when their mother confined the children to their room with nothing to eat. Slaughter's mother testified that he once fled from the house carrying his younger brother, Bobby, while his stepfather tried to shoot them. Slaughter's grandparents, Charlie Dean Leonard and Clara Leonard also testified at the hearing. All of Slaughter's relatives stated that they did not want him to be executed.

After the testimony of Slaughter's relatives, defense counsel called a series of experts to testify, beginning with Dr. Eric Engum, a clinical psychologist who examined Slaughter in 1994. Dr. Engum diagnosed Slaughter as having Attention Deficit Disorder ("ADD") and a learning disability that would make it difficult for Slaughter to understand complex legal concepts. Dr. Engum concluded that Slaughter could be rehabilitated and could respond positively to therapy. Dr. Gary Carl, a physician who specializes in treating abused and neglected children, testified that scars on Slaughter's body suggested that he had been beaten as a child. Dr. Vivian Spears, a psychologist, testified that Slaughter had received a poor education as a result of his ADD and that he would likely perform better in a structured environment. Lane Veltkamp, a licensed clinical social worker, testified that although Slaughter distrusted others and had a great deal of anger, these problems could be overcome by therapy. Dr. Delbert Drogin, a clinical psychologist and practicing attorney, testified that Dr. Johnson did an inadequate job evaluating Slaughter. While Dr. Drogin was unable to endorse Dr. Johnson's conclusions, he could not say that they were incorrect.

The final witness to testify at the hearing was Bette Niemi, an

attorney who had tried numerous capital cases. She testified that Radolovich rendered constitutionally ineffective assistance of counsel for a great number of reasons, including his failure to ask for an independent medical expert to testify during the penalty phase. She opined that an attorney should begin preparing for the penalty phase on the day that he gets assigned a capital case and that a competent attorney would begin this process by requesting the defendant's school, medical, and birth records. If an attorney learns that a client has supplied him with a false name, that attorney should perform an investigation into the client's real name. Niemi testified that there was material available that would have tipped Radolovich off that Slaughter's real name is Leonard. Niemi stated that it is inappropriate for a defense attorney to rely on a KCPC report for the mitigation phase because KCPC reports are not confidential and are distributed to the prosecution.

Despite the extensive proofs presented during the RCr 11.42 hearing, on June 22, 1995, the Jefferson Circuit Court overruled Slaughter's motion. The court concluded that Radolovich provided constitutionally effective assistance of counsel as judged by 1983 standards and also concluded that the new mitigating evidence would not have changed the jury's sentence. Slaughter appealed to the Supreme Court of Kentucky, which affirmed the ruling of the trial court in an unpublished opinion dated April 22, 1999. Applying the first prong of *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the court held that it was reasonable for Radolovich not to investigate Slaughter's background in light of Slaughter's false representations. The court also held that Radolovich's failure to request an independent mental health expert did not render his counsel constitutionally ineffective and, in any event, Slaughter was not prejudiced. The United States Supreme Court denied

certiorari on February 28, 2000. *Slaughter v. Kentucky,* 528 U.S. 1192, 120 S. Ct. 1250, 146 L. Ed. 2d 107 (2000).

C. Federal Habeas Proceedings

On April 20, 2000, Slaughter petitioned for a writ of habeas corpus. The United States District Court for the Western District of Kentucky granted relief on grounds of ineffective assistance of trial counsel, *Slaughter v. Parker,* 187 F. Supp. 2d 755 (W.D. Ky. 2001), finding that Radolovich had provided ineffective assistance during the penalty phase of the trial due to his failure to: 1) adequately prepare and investigate Slaughter's family background and social history, and 2) request an independent mental health expert to testify. The district court granted Slaughter a new penalty phase trial and the Commonwealth appealed.

The district court granted Slaughter a Certificate of Appealability on four issues: whether 1) the trial court erred by not instructing the jury on the lesser included offenses of wanton murder and second degree manslaughter; 2) the trial court abridged Slaughter's due process rights by not including the absence of extreme emotional distress in its murder instruction; 3) the jury was misled to believe that they must find mitigating factors unanimously; and 4) the trial court impermissibly allowed a juror to question Slaughter during the penalty phase. We expanded the Certificate of Appealability to include two additional issues: whether the trial court erred by 1) instructing the jurors at the penalty phase that they would merely "recommend" a sentence of death and 2) submitting to the jury a verdict form that was unconstitutional because it required the listing of aggravating factors but did not contain a parallel requirement for listing the mitigating factors. We address each issue in turn.

Because Slaughter filed his habeas petition in April 2000, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") apply. *Barker v. Yukins,* 199 F.3d 867, 871 (6th Cir. 1999) (AEDPA applies to petitions filed after April 24, 1996). Title 28 U.S.C. § 2254 sets out the requirements for a grant of habeas relief:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the State court proceedings.

"A state court decision is 'contrary to' clearly established Federal law if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a different result." *Ruimveld v. Birkett,* 404 F.3d 1006, 1010 (6th Cir. 2005) (internal quotations omitted). Furthermore, the statute "requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final." *Williams v. Taylor,* 529 U.S. 362, 380, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

We may grant habeas relief under the "unreasonable application" clause if the state court identifies the correct

governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts. *Williams,* 529 U.S. at 407-08, 120 S. Ct. 1495. "A federal habeas court may not issue a writ under the unreasonable application clause simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Bell v. Cone,* 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). In the absence of a state court decision on the federal constitutional case in question, the court of appeals conducts a review to determine whether the state court decision is contrary to Supreme Court jurisprudence. *Clifford v. Chandler,* 333 F.3d 724, 730 (6th Cir. 2003), *overruled in part on other grounds by Wiggins v. Smith,* 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

When reviewing a district court's decision to grant a writ of habeas corpus, we review *de novo* the court's legal conclusions and its factual findings for clear error. *Smith v. Hofbauer,* 312 F.3d 809, 813 (6th Cir. 2002). We give complete deference to evidence-supported state court findings of fact. *See Sumner v. Mata,* 455 U.S. 591, 597, 102 S. Ct. 1303, 71 L. Ed. 2d 480 (1982).

2. *Ineffective assistance of counsel*

The district court granted Slaughter relief based on constitutionally ineffective assistance during the penalty phase of the trial. Specifically, the district court found that Radolovich's investigation into mitigation for purposes of the penalty phase was insufficient. To establish ineffective assistance of counsel, Slaughter must show that 1) his counsel rendered deficient performance and 2) this deficient performance prejudiced the defense so as to render the trial

unfair and the result unreliable. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under AEDPA, we will only overturn a state appellate court's ruling on ineffective assistance of counsel if it is an unreasonable application of *Strickland. Bell,* 535 U.S. at 693-94, 122 S. Ct. 1843. When analyzing an ineffective assistance of counsel claim on habeas review, we consider both the evidence adduced at trial and the evidence adduced in the habeas proceeding. *Towns v. Smith,* 395 F.3d 251, 257 (6th Cir. 2005).

Slaughter claims that two omissions render Radolovich's assistance ineffective. First, Slaughter argues that Radolovich should have investigated whether Slaughter had any family members other than his aunt. Second, Slaughter faults Radolovich's decision not to research his birth, school, and medical records.

We consider first whether the Supreme Court of Kentucky's decision that Radolovich performed an adequate investigation in preparation for the penalty phase was reasonable. In determining whether counsel rendered ineffective assistance, we measure counsel's performance by standards prevailing at the time of Slaughter's trial. *See Strickland,* 466 U.S. at 690, 104 S. Ct. 2052. A court's scrutiny of counsel's performance is highly deferential. *Id.* at 691, 104 S. Ct. 2052. "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690, 104 S. Ct. 2052. This court has held that *Strickland's* "reasonableness" standard "includes counsel's duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Hamblin v. Mitchell,* 354 F.3d 482, 486 (6th Cir. 2003) (internal quotation

omitted). *Strickland* held that, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91, 104 S. Ct. 2052.

Slaughter urges us to look to the Supreme Court's decision in *Wiggins v. Smith,* 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d471 (2003) for guidance in how to apply *Strickland.*[2] The *Wiggins* Court held that a state court's determination that counsel's performance was constitutionally effective was unreasonable because counsel's failure to investigate

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[2] At first blush Slaughter's argument seems problematic because *Wiggins* was published after his conviction became final. *See Schriro v. Summerlin,* 542 U.S. 348, 352, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) (new rules of criminal procedure generally do not apply retroactively to cases already final on direct appeal). A careful reading of *Wiggins,* however, reveals that the Court looked to *Strickland* while analyzing whether trial counsel performed an adequate investigation in preparing for the penalty phase of Wiggins's trial, which occurred in October of 1989. *See Hamblin,* 354 F.3d at 487 ("[t]he Court in *Wiggins* clearly holds ... that it is not making 'new law' on the ineffective assistance of counsel either in *Wiggins* or in the earlier case on which it relied for its standards, *Williams v. Taylor* [ ]"). Hence, we may look to *Wiggins* to decide whether the Supreme Court of Kentucky unreasonably applied Supreme Court precedent.

"resulted from inattention, not reasoned strategic judgment." *Id.* at 526, 123 S. Ct. 2527. "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527, 123 S. Ct. 2527.

We agree with the district court that Radolovich's performance was deficient. Evidence adduced at the RCr 11.42 hearing demonstrates that a competent attorney would not have relied on the state's background report as Radolovich did, and that Radolovich spent an insufficient amount of time preparing for the penalty phase of Slaughter's trial. Radolovich made no effort to research Slaughter's family background. By his own account, he failed to ask Slaughter's aunt whether she knew of any other family members who might be willing to testify on Slaughter's behalf. Moreover, Radolovich made no effort to pursue Slaughter's birth, school or medical records. He made no effort to obtain an independent psychological evaluation of Slaughter.[3] We see no evidence that Radolovich made a reasonable decision that would have rendered such investigations unnecessary, and we find that his failure to research Slaughter's history "resulted from inattention, not reasoned strategic judgment." *Wiggins,* 539 U.S. at 526, 123 S. Ct. 2527. We therefore conclude that Slaughter has

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[3] During oral argument, the warden asserted that, at the time of Slaughter's trial, Kentucky law provided for a defendant's evaluation at a private mental health facility only under "extraordinary circumstances." The warden did not supply us with any authority for this assertion, and we have found none. It appears to us that the trial judge could have granted an independent examination if it were "reasonably necessary." *See Hicks v. Commonwealth,* 670 S.W.2d 837, 838 (Ky. 1984).

satisfied the first prong of the *Strickland* test.

In order to establish ineffective assistance of counsel, Slaughter must also show that Radolovich's deficient performance prejudiced him by rendering the trial unfair and its result unreliable. *Strickland,* 466 U.S. at 687, 104 S. Ct. 2052. To do so, Slaughter "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S. Ct. 2052. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. 2052. When the defendant alleges that counsel provided ineffective assistance during the penalty phase of a capital trial, the question is whether there is a "reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S. Ct. 2052. On the other hand, there is an insufficient showing of prejudice where "one is left with pure speculation on whether the outcome of the trial or the penalty phase could have been any different." *Baze v. Parker,* 371 F.3d 310, 322 (6th Cir. 2004).

We do not find it reasonably probable that the outcome of Slaughter's sentencing would have been different if Radolovich had unearthed the testimony presented at the RCr 11.42 hearing. Had Radolovich located Slaughter's family, the jury would have heard testimony from Slaughter's mother, brothers, and grandparents that Slaughter was abandoned by his father, abused by his mother and step-father, and frequently left in charge of his siblings. The jury

heard such testimony from Slaughter himself. Accordingly, we are not convinced that the additional testimony of Slaughter's family members would have influenced the jury's decision. Although the jury would also have witnessed Slaughter's family members ask the jury to spare his life, we are "left with pure speculation" as to the effect those requests might have had on the trial's outcome. *Baze*, 371 F.3d at 322.

Similarly, the failure to research his birth, health and school records did not prejudice Slaughter. After we heard oral argument in this appeal, Slaughter moved to supplement the record with various of these documents, and, although we deny the motion, *see Bradshaw v. Richey*, --- U.S. ----, 126 S. Ct. 602, 605, 163 L. Ed. 2d 407 (2005), out of an abundance of caution we have reviewed the proffered documents. *See also Holland v. Jackson*, 542 U.S. 649, 652-53, 124 S. Ct. 2736, 159 L. Ed. 2d 683 (2004). We conclude that Slaughter has not established prejudice resulting from their absence at trial. Because Slaughter's expert witnesses testified that he never received medical care for his injuries, we find it likely that a search of his medical records would not have been productive. A review of Slaughter's school records would have informed the jury that he was a poor student, a fact that jurors would not have found helpful. Finally, we could make the charitable assumption that a review of Slaughter's records would have led Radolovich to Slaughter's family, but for the reasons already stated, this assumption would not establish prejudice.

Finally, it is not reasonably probable that Radolovich's failure to obtain an independent psychological examination resulted in prejudice. Expert psychological testimony presented at the RCr 11.42 hearing was largely the same as Dr. Johnson's testimony at trial. Dr. Johnson testified that

Slaughter suffered from ADD, had an anti-social personality and would benefit from a highly-structured environment, such as prison. At the RCr 11.42 hearing, experts testified that Slaughter had ADD, would benefit from a structured environment, distrusted others and had a great deal of anger. We conclude that the addition of such testimony would not have affected the outcome of Slaughter's trial and therefore, Slaughter has not shown prejudice resulting from his trial counsel's deficient performance. We therefore hold that the district court erred in finding that Slaughter is entitled to habeas relief on grounds of ineffective assistance of counsel at the penalty phase of his trial.

3. *Juror questioning*

Slaughter argues that he was denied due process when the trial court allowed a juror to question him. Because "it is questionable whether Petitioner fully and fairly presented this issue to the state courts as a matter of federal constitutional law in the first instance," the district court held that Slaughter defaulted this claim. After reviewing a copy of Slaughter's direct appeal to the Supreme Court of Kentucky, we agree.

Before seeking federal habeas relief, state prisoners must first exhaust their available state court remedies by fairly presenting all their claims to the state courts. *Whiting v. Burt,* 395 F.3d 602, 612 (6th Cir. 2005). Ordinarily, the exhaustion requirement is satisfied once the petitioner has fairly presented all his claims to the highest court in the state in which he was convicted, thus giving the state a full and fair opportunity to rule on those claims before the petitioner seeks relief in federal court. *O'Sullivan v. Boerckel,* 526 U.S. 838, 842, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). This can be done by invoking one full round of the state's established procedures. *Id.* In reviewing the state court

proceedings to determine whether a petitioner has "fairly presented" a claim to the state courts, we have looked to the petitioner's: (1) reliance upon federal cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law.

Whiting v. Burt, 395 F.3d 602, 613 (6th Cir. 2005). While a petitioner need not cite "chapter and verse" of constitutional law, "general allegations of the denial of rights to a 'fair trial' and 'due process' do not 'fairly present claims' that specific constitutional rights were violated." *Blackmon v. Booker,* 394 F.3d 399, 400 (6th Cir. 2004) (internal citations omitted).

Slaughter's brief to the Supreme Court of Kentucky reproduces the juror's question, argues that it was improper, and concludes "[b]ased on this denial of due process and a fair trial by an impartial jury, appellant is entitled to a new trial." In support he cites "14th and 6th Amendments. Section 11 of the Kentucky Constitution." This is the only reference to federal law that Slaughter's brief makes. The rest of the argument urges only that the trial court did not comply with Kentucky law when it allowed for juror questioning. The brief relies on a number of state court cases but does not cite a single federal case. On direct appeal, the Supreme Court of Kentucky denied Slaughter's claim because "[i]t is proper for jurors to ask questions of witnesses so long as they are pertinent and competent." *Slaughter,* 744 S.W. 2d at 413 (citing *Miller v. Commonwealth,* 188 Ky. 435, 222 S.W. 96 (Ky. 1920)). The court made no reference to federal law, and did not treat Slaughter's claim as one brought under federal law.

This case is distinguishable from *Dye v. Hofbauer,* in which the Supreme Court reversed our holding that a habeas petitioner had not adequately presented his federal claim to the state court. --- U.S. ----, 126 S. Ct. 5, 163 L. Ed. 2d 1 (2005). In *Dye,* the Court noted that the petitioner's state court brief not only alleged a violation of due process but also explicitly referenced four federal cases, all of which addressed due process violations. Slaughter's case is clearly distinguishable. Unlike the brief at issue in *Dye,* the only reference to federal law in Slaughter's state court brief on this issue is the bare and isolated citation to the Fourteenth and Sixth Amendments. Accordingly, we conclude that Slaughter has not fairly presented his claim, which is essentially a "general allegation[ ] of the denial of a right to a 'fair trial.' " *See Blackmon,* 394 F.3d at 400.

Finally, were we to address Slaughter's claim on its merits, we would find it lacking. It is unlikely that Slaughter was prejudiced by the juror's question, and Slaughter has cited no Supreme Court decision, nor are we aware of any holding that juror questioning violates the Sixth or the Fourteenth Amendments.

4. *Jury instructions did not contravene* Beck

Slaughter next argues that the Commonwealth violated his Eighth and Fourteenth Amendment rights by refusing to instruct the jury on the offenses of wanton murder and second degree manslaughter. The Supreme Court of Kentucky denied this claim on the merits. *Slaughter,* 744 S.W.2d at 412-13. In order to receive habeas corpus relief from incorrect jury instructions, Slaughter must show that they were so infirm as to render the entire trial fundamentally unfair. *Estelle v. McGuire,* 502 U.S. 62, 72, 112 S. Ct. 475,

116 L. Ed. 2d 385 (1991).

The Supreme Court in *Beck v. Alabama* held that the death penalty may not be constitutionally imposed when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict. 447 U.S. 625, 627, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). Both the Supreme Court of Kentucky and the district court held that Slaughter's *Beck* claim failed because the evidence would not support a verdict of wanton murder or second degree manslaughter. We agree.

In *Schad v. Arizona*, the Court held that a petitioner charged with capital murder was not entitled to an instruction on the lesser included offense of robbery because the trial court had also instructed the jury on the lesser included offense of second-degree murder. 501 U.S. 624, 646-48, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991). *Schad* stated:

> Our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all ....

We repeatedly stressed the all-or-nothing nature of the decision with which the jury was presented .... This central concern of *Beck* simply is not implicated in the present case, for petitioner's jury was not faced with the all-or-nothing choice between the offense of conviction (capital murder) and innocence.

Id. at 646-47, 111 S. Ct. 2491. In Slaughter's case, the trial court instructed the jury on first-degree robbery as well as

intentional murder. As in *Schad*, the jury was not faced with an all-or-nothing choice. Because the jury had the option to convict Slaughter of a lesser, though still violent, crime, we find that *Beck* is not implicated.

Even if we were to apply *Beck*, Slaughter's claim would fail because the evidence would not have supported instructions on wanton murder and second-degree manslaughter. "A person is guilty of wanton murder when ... he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person." *Cook v. Commonwealth of Kentucky,* 129 S.W.3d 351, 362 (Ky. 2004) (quotation omitted). According to the Supreme Court of Kentucky,

> A person acts wantonly *with respect to a result or to a circumstance* described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

Elliott v. Commonwealth of Kentucky, 976 S.W.2d 416, 418 (Ky. 1998). "A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person ...." K.R.S. 507.040(1).

The Supreme Court of Kentucky's decision denying Slaughter's claim was not contrary to *Beck*. As the district court correctly observed, "[t]he evidence at trial plainly established that the victim was bludgeoned in the head and stabbed five times in the chest, including a stab wound that penetrated five inches into her chest and pierced her heart."

Slaughter, 187 F. Supp. 2d at 805. These facts foreclose the conclusion that Slaughter acted with any mental state other than intent. *See Campbell v. Coyle,* 260 F.3d 531, 543 (6th Cir. 2001) (state court's denial of instruction on lesser included offense of manslaughter was not objectively unreasonable because the murder victim had sustained five stab wounds). Although Slaughter argues that he merely created a grave risk of death or serious injury by helping Red, the real killer, the record is devoid of evidence to support Slaughter's story. In light of overwhelming evidence of Slaughter's intent, we agree with the ruling of the Supreme Court of Kentucky.

5. *Jury instructions did not omit an essential element of murder*

Slaughter insists that the Commonwealth failed to prove the absence of extreme emotional disturbance, which he alleges was an essential element of murder on the date of his conviction. The Supreme Court of Kentucky summarily denied this claim as "without merit." *Slaughter,* 744 S.W. 2d at 409.

Slaughter's argument sounds in due process. He cites *California Dep't of Corrections v. Morales,* 514 U.S. 499, 504, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995) in support of the proposition that the *ex post facto* clause prohibits state legislatures from retroactively altering the definition of crimes and then relies on *Bouie v. Columbia* 's rule that the *ex post facto* clause applies to judicial construction as well. 378 U.S. 347, 353-54, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964) ("If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that the State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction").

According to Slaughter, as of the date that he was convicted, the Supreme Court of Kentucky treated the absence of extreme emotional disturbance as an element of murder, and, therefore, the trial court erred by not requiring the jury to find the absence of extreme emotional disturbance as an element. This argument fails. In Kentucky, a person is guilty of murder when,

With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.

K.R.S. 507.020(1)(a). In 1979, the Supreme Court of Kentucky held "[a] failure to act under the influence of extreme emotional disturbance is an element of the offense of murder, and if the evidence affords any basis upon which the jury could entertain a reasonable doubt as to whether appellant acted under the influence of extreme emotional disturbance, the absence of that element must be enumerated as part of the instruction on murder ...." *Edmonds v. Commonwealth of Kentucky,* 586 S.W.2d 24, 27 (Ky. 1979). One year later, the Supreme Court of Kentucky shifted gears and held, "[a]n instruction on murder need not require the jury to find that the defendant was not acting under the influence of extreme emotional disturbance unless there is something in the evidence to suggest that he was, thereby affording room for a reasonable doubt in that respect." *Gall v. Commonwealth of Kentucky.,* 607 S.W.2d 97, 109 (Ky. 1980), *overruled on other grounds in Payne v.*

Commonwealth of Kentucky, 623 S.W. 2d 867, 870 (Ky. 1981).

While *Gall* did not expressly overrule *Edmonds,* it made perfectly clear that an instruction on murder need not list the absence of extreme emotional disturbance as an element unless there is something in the evidence to suggest that the defendant was, in fact, influenced by extreme emotional disturbance. "Under [extreme emotional disturbance], mitigation is not restricted to circumstances which would constitute provocation in the ordinary meaning of the term. In other words it is possible for *any event, or even words,* to arouse extreme mental or emotional disturbance .... We recognize that there must be some definite, non-speculative evidence to support an [extreme emotional disturbance] instruction." *Holland v. Commonwealth of Kentucky,* 114 S.W.3d 792, 806-07 (Ky. 2003) (internal quotations and citations omitted). To support his claim of extreme emotional disturbance, Slaughter presented only the testimony of two witnesses who reported that Slaughter admitted that his main intention was to rob the Clothes Rack, but that he got scared when the victim started screaming and he stabbed her. This evidence is plainly insufficient. Being "scared" is a far cry from being in a state of "extreme emotional disturbance." Accordingly, an instruction on extreme emotional disturbance was unwarranted. Because the Commonwealth scrupulously complied with its own laws, no due process violation has occurred. Slaughter is not entitled to habeas relief on this ground.

6. *Jury instructions did not mislead jurors regarding mitigating factors*

Relying on *Mills v. Maryland,* 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), Slaughter next contends that the

jury instructions impermissibly led members of the jury to believe that they could consider only mitigating factors as to which they agreed unanimously. Slaughter did not raise this challenge on direct appeal before the Supreme Court of Kentucky but instead argued that the instructions failed to require consideration of certain mitigating factors. The trial court instructed Slaughter's jury to "consider such mitigating or extenuating facts and circumstances as have been presented to you in the evidence and you believe to be true, including but not limited to such of the following," and then included a list of eight mitigating factors.

The Commonwealth argues that Slaughter may not avail himself of *Mills* because that decision was published in 1988, a year after the Supreme Court of Kentucky denied his claim on direct review. New rules of criminal procedure, such as the one enunciated in *Mills*, apply retroactively to all cases not yet final on direct review. *Booker*, 543 U.S. at 268, 125 S. Ct. 738, *Beard v. Banks*, 542 U.S. 406, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004). Slaughter therefore could have, but did not, raise *Mills* in his petition for certiorari. Slaughter's conviction became final on June 12, 1989, the day that the Supreme Court of the United States denied Slaughter's petition. *See Beard*, 542 U.S. at 413, 124 S. Ct. 2504. The scope of permissible authority in our review of habeas cases is limited to Supreme Court decisions available at the time the state court rendered its decision. *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). Accordingly, we may not consider *Mills* in this case.

The Supreme Court of Kentucky did not have the benefit of *Mills*, which was decided on June 6, 1988. *Lockett v. Ohio*, which held that the sentencing body in a capital case cannot constitutionally be precluded from considering as a

mitigating factor "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," was the governing legal principle in place at the time of the Supreme Court of Kentucky's decision. 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (footnote omitted).[4] The challenged instruction in this case complied with *Lockett*. It did not require unanimity or in any way prevent jurors from considering mitigating factors. Instead, it told jurors to consider the mitigating factors that had been presented and that they believed to be true. The Supreme Court of Kentucky's decision was therefore proper under *Lockett*.

7. *Jury instructions that said that jurors would "recommend" a punishment were not misleading*

Slaughter argues that the trial court violated his rights under *Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) by instructing the jury that they would only "recommend" a sentence during the penalty phase. *Caldwell* held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the

[4] The Supreme Court in *Mills* held that it is unconstitutional to require jurors to find mitigating circumstances unanimously. 486 U.S. at 375, 108 S. Ct. 1860. Specifically, sentencing instructions that create a substantial likelihood that reasonable jurors might think that they are precluded from considering any mitigating evidence in the absence of unanimity are constitutionally invalid under *Mills*, 486 U.S. at 384, 108 S. Ct. 1860. While *Lockett* could be thought to support the *Mills* rule, "reasonable jurists could have differed as to whether the *Lockett* principle compelled *Mills*." *Beard*, 542 U.S. at 414, 124 S. Ct. 2504. Thus, the Supreme Court of Kentucky cannot be faulted for failing to predict *Mills*.

defendant's death rests elsewhere." *Id.* In order to make out a claim under *Caldwell,* a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law. *Romano v. Oklahoma,* 512 U.S. 1, 9, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994). Slaughter has failed to make this showing. After considering any aggravating and mitigating circumstances in a capital case, a jury in Kentucky "recommends" a sentence for the defendant. K.R.S. § 532.025(1)(b). Upon the findings of the jury, the trial judge then shall "fix" the sentence within the limits prescribed by law. *Id.* "[T]he statutory scheme not only permits, but anticipates, that the trial court will play a separate and different role in sentencing in capital cases after the jury's verdict has been received." *Matthews v. Commonwealth of Kentucky,* 709 S.W.2d 414, 423 (Ky.1985). Under K.R.S. § 532.025(1)(b), when a jury recommends the death penalty, the trial judge is authorized to reduce the sentence to a term of imprisonment within the limits prescribed by law. *Smith v. Commonwealth of Kentucky,* 634 S.W.2d 411, 413-14 (1982).

The Supreme Court of Kentucky has long wrestled with jury instructions in capital cases that use the word "recommend." In *Ice v. Commonwealth of Kentucky,* 667 S.W.2d 671, 676 (Ky. 1984), the court granted a death penalty defendant a new trial and held that "emphasis on the jury's sentence as only a recommendation is improper." A year later, the court affirmed a defendant's death sentence and noted that although the Commonwealth stated that the jury would only "recommend" the death penalty, it was not used "to such an extent as to denigrate the responsibility of the jury in imposing a death penalty." *Kordenbrock v. Commonwealth of Kentucky,* 700 S.W.2d 384, 389 (Ky. 1985). In *Tamme v. Commonwealth of Kentucky,* the Court stated that the Commonwealth's repeated use of the word "recommend"

implied that the jury's recommendation held little or no weight and could be rejected by the court. 759 S.W. 2d 51, 53 (1988). *Tamme* then held "[o]n retrial, the prosecutor should refer to the jury's function as 'fixing' sentence. Furthermore, we hold that in capital cases in which trial commences after the effective date of the finality of this opinion, the word 'recommend' may not be used with reference to a jury's sentencing responsibilities in voir dire, instructions or closing argument." *Id.* Technical violations of this rule do not constitute reversible error, *Foley v. Commonwealth of Kentucky,* 942 S.W.2d 876, 888 (Ky. 1996), and the rule does not apply retroactively. *Gall,* 231 F.3d at 330.

The Sixth Circuit has rejected arguments nearly identical to Slaughter's in at least two cases. *Id.* at 330; *Kordenbrock,* 919 F.2d at 1101. The trial court's description of the jury's role accurately reflected Kentucky law at the time, which granted the trial court the power to reduce the penalty that the jury recommended. *Smith,* 634 S.W.2d at 413-14 (citing K.R.S. § 532.025(1)(b)). While Slaughter's trial judge did use the word "recommend" in the jury instructions, he did not make profligate use of the word in a way that would confuse the jurors. Finally, as the *Gall* and *Scroggy* courts held, the state cases that instruct Kentucky's courts to use the word "fix" instead of "recommend" do not apply retroactively. Because the trial court's use of the word "recommend" was not contrary to *Caldwell,* Slaughter is not entitled to relief based on the jury instructions.

8. *The verdict form was not unconstitutional*

Slaughter's final argument is that the Commonwealth denied him due process by using an unfair verdict form. The form required the jury, if it chose a sentence of death, to write the

aggravating factor on lines provided directly above the sentence. The jury was not required to similarly memorialize the mitigating factors. Such a form, Slaughter argues, necessarily skewed the sentence toward death because it implicitly instructed the jurors not to consider the mitigating factors.

We must consider the verdict form in conjunction with the jury instructions. *Cupp v. Naughten,* 414 U.S. 141, 146-47, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973). Here, the trial court explicitly admonished jurors to "consider such mitigating or extenuating facts and circumstances as have been presented to you in the evidence and you believe to be true ...." In addition, the jury instructions plainly required the jury to memorialize the aggravating factor *only* if it first concluded that a sentence of death was appropriate. In order to so conclude, the jury must have first taken the mitigating factors into account. In other words, the jury's memorialization of the aggravating factor could not have skewed its sentence because the jury had already made its decision by the time memorialization was required.

In support of his argument, Slaughter cites several Supreme Court cases which stand for the proposition that the Constitution prohibits the irrational or arbitrary imposition of the death penalty, *see e.g. Spaziano v. Florida,* 468 U.S. 447, 449, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984). He fails, however, to reference any Supreme Court case requiring jurors to list mitigating factors when the verdict form requires them to list aggravating factors. Here, the verdict form did not result in the irrational or arbitrary imposition of the death penalty, and we therefore hold that the Commonwealth's use and approval of the form were not contrary to clearly established federal law. Accordingly, Slaughter is not entitled to relief on the basis of the verdict

form.

For all of the foregoing reasons, we **REVERSE** the district court's grant of habeas relief on the basis of ineffective assistance of counsel, we **AFFIRM** the district court's denial of relief on all other grounds and we DENY Slaughter's motion to supplement the record.

R. GUY COLE. JR., Circuit Judge dissenting.

The majority concludes that Radolovich's performance was constitutionally deficient. With this proposition, I am in complete agreement. However, because I believe that Slaughter was prejudiced by such deficient legal representation, and because I believe Slaughter preserved his federal claim, I respectfully dissent.

I.

At the RCr 11.42 hearing, Slaughter's post-conviction counsel presented mitigation evidence that was available at the time of trial, but which Radolovich had not uncovered or presented. This included testimony from Slaughter's mother, brothers, grandparents, and a friend, as well as testimony from a social worker, medical doctor, and educational specialist. Contrary to the majority's opinion, the evidence presented at the hearing is not only overwhelming, but is substantively more comprehensive than (and in many instances conflicts with) that presented during Slaughter's penalty phase. *See Workman v. Tate,* 957 F.2d 1339, 1346 (6th Cir.1992) (holding that defendant was prejudiced by counsel's failure to present evidence that, although cumulative to some degree, "would have contradicted directly" negative testimony). This evidence is so substantial, in fact, that the trial court described it as

"impressive," and stated that the court had "never been presented at trial with such an accumulation of 'mitigating' evidence during a penalty phase." Had this evidence been presented during the penalty phase, there is certainly "a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695, 104 S. Ct. 2052.

A. Family

Slaughter testified on his own behalf during the penalty phase. Although Radolovich prepared Slaughter to testify during the guilt phase, he did not prepare Slaughter for the all-important penalty phase. Regarding penalty-phase preparation, Radolovich testified that "[t]here was none to that .... Our whole thrust was on the guilt phase." During the penalty phase, Slaughter took the stand. On direct examination, Slaughter testified that he ran away from home when he was twelve-years old, that he dropped out of school in the seventh grade, and that he was on drugs at the time of the offense. Slaughter testified that he was not then providing financial support for his three-year old son. Furthermore, Slaughter testified that he had been involved in an incident in which his companions shot a man in a car. Slaughter testified that he did not do anything upon realizing the man had been shot.

Although Radolovich elicited some testimony that could fairly be described as mitigating, it was minimal. Slaughter testified that he was twenty years old, that his parents separated when he was three years old, that his father was killed in 1972, that his mother beat him with extension cords, that he ran away from home when he was twelve, that his mother died of cancer in 1980, that he had a young child, and

that he was sorry about the victim's death. Slaughter also described his activities in prison, including his jobs in the prison hospital and the janitorial division. Radolovich did not present mitigating evidence from any other witness. He introduced no documents chronicling Slaughter's childhood, nor his school or medical history.

Had Radolovich properly investigated Slaughter's background, he would have been able to present the testimony of Slaughter's mother, Mary Moon, who was not deceased; Slaughter's two younger brothers, Bobby and Vincent Moon; and Slaughter's maternal grandparents, Clara and Charles Leonard. The jury would have learned that Slaughter had an exceptionally difficult childhood. Mary Moon, Slaughter's mother, testified that she gave birth to Slaughter when she was only fifteen-years old, and that Slaughter's biological father abandoned him after spending only a month with Slaughter. The jury also would have learned that Slaughter's father was a thief, who provided no financial support for his son.

Thomas Moon, Mary's husband and the father of Slaughter's brothers, lived with the family for seven years, although he did not provide any support for the children. Mary testified that Thomas was an abusive alcoholic; she testified that due to fighting, there were police at their home every weekend. When Slaughter was eight years old, Thomas threatened to kill Mary and the children. Upon hearing this threat, Slaughter exited the front door of the house with his little brother in his arms. Thomas Moon shot at the children through the front door, but did not hit them. Mary Moon and her children left Thomas after that incident.

Mary Moon testified that Slaughter was raised in impoverished circumstances. After she left Thomas, she had

another child named Vincent. Although Vincent's father helped support Vincent financially, no one else provided additional financial support to the family. To support her family, Mary Moon worked as a cleaning woman, for which she earned $5 a day. At her job at the local sawmill, she earned $1.35 an hour, and she earned an additional $1.05 an hour working as a waitress. Moon did not receive assistance from the state, and she and her children lived in low-income housing. Slaughter attempted to help his mother financially, by cutting grass at cemeteries and doing odd jobs. When Slaughter's grandmother was not able to care for the children, Slaughter was charged with taking care of his two younger brothers. Both brothers testified that they were usually left in Slaughter's care, who was only four years older than the eldest of his younger brothers.

The jury would have learned that Mary Moon was abusive to Slaughter and his brothers. She testified: "I really whooped the devil out of my children." She testified to beating Slaughter so badly that scars remain on his back. She would beat him with a switch or a belt, and when he made her angry enough, she would beat him with whatever it was she had in her hand at the time. Bobby Moon confirmed Mary Moon's testimony; he testified that their mother would beat them with a variety of objects: "We got whoopens with a belt, switches, extension cords, broom, probably the first thing she could pick up, cause she was mad." Vincent testified that he saw his mother beat Slaughter with an extension cord. He also testified that his mother would lock them in their rooms without food, but that when Vincent was locked up, Slaughter would slip him food after their mother left for work.

Furthermore, the jury would have learned that Slaughter could not retreat into the neighborhood to escape his

turbulent home life. Both brothers confirmed that they had a difficult childhood, and testified that their neighborhood was crime-ridden. Despite the prevalence of crime in their neighborhood, Vincent testified that none of the brothers, including Slaughter, used drugs or alcohol.

The jury would have further learned that despite the fact that Slaughter had a difficult childhood, he was exceptionally close with his family. Referring to Slaughter's grandmother, Mary Moon testified that "[s]he was his heart. He was her heart too." Up until her death in 1991, Slaughter talked to his grandmother on the phone every week. Charles Leonard, Slaughter's maternal grandfather, testified that when Slaughter lived with his mother, they visited Leonard during the summer. Bobby Moon testified that Slaughter took care of him and Vincent. "[H]e did everything for us. You know, he made sure we was [sic] fed and, you know, we was there at the house. He basically took care of us." Vincent similarly testified that Slaughter cooked for them, and did his best to provide for them.

Bobby testified that Slaughter encouraged his younger brothers to stay out of trouble, and that he always gave them good advice. Both brothers testified that when they were children, Vincent found a bullet, which Slaughter took away from him. Vincent testified that when Slaughter was asleep, he recovered the bullet, which subsequently exploded in Vincent's face. Vincent testified that Slaughter picked him up, took him across the street, and convinced a neighbor to take them to the hospital.

Finally, the jury would have learned that Slaughter received a head injury when he was five years old. Mary Moon testified that she believed that Slaughter hit his head on the corner of the refrigerator; the gash took at least ten stitches to close.

Slaughter received no further medical care for the injury, until he began suffering from terrible headaches. At that point, he also started "falling out." Moon took him to a doctor, who recommended that he see a specialist, which Moon could not afford. Instead, she took Slaughter to another doctor, hoping that the doctor would prescribe pills or some other form of relief. Slaughter never received proper treatment for his injury. According to Moon, Slaughter did receive some x-rays, and the doctors wanted him to go to Birmingham, Alabama, for more specialized treatment. However, because she did not have insurance, he did not receive any such treatment. Slaughter's grandmother and grandfather both testified that Slaughter suffered from severe headaches as a child.

Perhaps most importantly, the jury was deprived of the opportunity to observe that, despite this abuse, Slaughter's family cared about him deeply. Slaughter's mother, brothers and grandparents each testified that they did not even know about the trial until after it had taken place. Not one of them was contacted by Radolovich to testify on Slaughter's behalf. Each testified at the hearing that they would have been eager to testify on Slaughter's behalf. Mary Moon testified that she loved Slaughter. Bobby Moon also testified that he cared about his brother:

I can say-I think about my brother every night. I love my brother a lot. I just can't explain to the Court how I feel about him. [inaudible] excuse me. There's not a night that I don't think about my brother. I think about him everyday. I love him a lot, I really do.

Bobby testified that he did not want to see Slaughter die in the electric chair, and that if he did, he "probably couldn't make it [him]self." Vincent testified that he loved Slaughter,

and that he did not want to see him die.

B. Expert Testimony

The majority concludes that Slaughter was not prejudiced by the Radolovich's reliance on Dr. Johnson's testimony. Dr. Johnson, a psychiatrist from the Kentucky Correctional Psychiatric Center,[5] described Slaughter as cavalier, as having an extensive history of anti-social behavior, and as a "marginally functioning individual" with a predisposition for violent activities. Dr. Johnson testified that Slaughter was uncooperative during the examination and that Slaughter has a borderline personality disorder. He testified that "[b]orderline individuals typically experience a wide variety of problems in their life, problems with their families, problems in occupation, problems in academic achievement, difficulties ranging from moderate to severe across virtually every dimension of their life." During cross-examination, Dr. Johnson testified that a high percentage of people who commit robbery and murder have an anti-social personality disorder.

Dr. Johnson also testified that Slaughter had abused alcohol, amphetamines, cannabis, and hallucinogens. He testified that Slaughter's functioning was very poor, noting "marked impairment in both social relations and occupational functioning." He further testified that Slaughter had never held steady, legal employment, and had obtained no lasting interpersonal relationships with friends or family. Dr. Johnson testified that without treatment, "Mr. Slaughter in all likelihood would continue his lifestyle very much as it has

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[5] Radolovich did not seek funds to hire an independent expert to evaluate Slaughter, although it was common in Lexington in 1983 to seek such funds in death penalty cases.

been for the last fifteen years or so, kind of nomadic lifestyle, wandering around the country, never establishing any permanence, never achieving much of anything in his life, never contributing anything in society ...."

Dr. Johnson's testimony does not strike me as mitigating. As Radolovich expressed during his testimony in the RCr 11.42 hearing, "Dr. Johnson's testimony was harmful."

Although the majority conveys great confidence in the accuracy of Dr. Johnson's assessment of Slaughter, the expert witnesses testifying at the RCr 11.42 hearing were understandably skeptical. Dr. Delbert Drogin, a clinical psychologist and attorney in Kentucky, reviewed Dr. Johnson's evaluation of Slaughter. Dr. Drogin testified that at the time of Slaughter's evaluation, Dr. Johnson had been licensed to practice as a psychologist for only a year. Dr. Drogin further testified that it did not appear that Dr. Johnson received any information about Slaughter from his family members, nor did it appear from his report that Dr. Johnson conferred in any significant manner with Slaughter's attorney.

Dr. Drogin testified that although Dr. Johnson attempted to administer a series of intelligence tests on Slaughter, he did not successfully administer any test that was an adequate measure of Slaughter's intelligence. The order in which Dr. Johnson attempted to administer tests is unclear from his report, and thus drastically undermines the accuracy of those tests. Dr. Drogin further testified that there were errors in the administration of some of the tests: correct answers were marked as incorrect, the scoring was incorrectly totaled, and some answers had been written and crossed out. Dr. Drogin testified that by misscoring a key test, Dr. Johnson effectively cut Slaughter's IQ by up to 25 points, an error that

Dr. Johnson failed to notice or remedy. Based on these errors, Dr. Drogin testified that he had very little confidence in Dr. Johnson's report. "[T]here are two classes of mistake that are there on their face. I don't know what else it might have right or wrong about the test." Similarly, Dr. Drogin testified that he had very little confidence in Dr. Johnson's testimony during the penalty phase, because it was based on his inaccurate testing.

In evaluating Slaughter, Dr. Johnson further relied on the Rorschach Personality Test, wherein the subject interprets a series of inkblots. Dr. Drogin testified that the test is not a valid measure in a forensic evaluation, because there are too many questions about its reliability and validity. Furthermore, Dr. Drogin testified that Dr. Johnson "partially or mostly" scored the Rorschach test. Dr. Drogin testified that, because Dr. Johnson did not include any of results of the Rorschach test in his report, it is not "possible to evaluate the accuracy of [Dr. Johnson's] ultimate conclusions."

Dr. Drogin testified that the Rorschach Personality Test and the Meyer Incomplete Sentence Test, another test that Dr. Johnson administered unsuccessfully, were not objective tests, and were thus not reliable indicators of personality. The only objective test Dr. Johnson attempted to perform was the Minnesota Multiphasic Personality Inventory ("MMPI"), which consists of over 500 true/false questions, which Slaughter never completed. Dr. Drogin testified that the MMPI is regarded very highly by clinical psychologists, in contrast to the tests upon which Dr. Johnson ultimately relied. Dr. Drogin testified that based on Slaughter's score sheet, it appeared that he had answered twenty fairly random questions. Dr. Drogin testified that based on the pattern of responses, he could not ascertain anything from the answer sheet-not even the order in which the answers were originally

filled out.

In his report, Dr. Johnson said about the MMPI: "Generally the patient was reluctant to constructively participate in taking the MMPI and stated that he preferred to talk to examiner." Dr. Drogin testified that Slaughter's score sheet revealed "twenty separate attempts to do something with this test." He testified that Slaughter's ability to answer some questions, but not complete the whole test, could be explained by confusion, improper instruction, or that fact that Slaughter was taking his time, as opposed to a refusal to cooperate. Dr. Drogin opined that Slaughter might have answered some but not all of the questions because of difficulty reading or comprehending the questions. In order to complete the test, Dr. Drogin testified that the MMPI could have been administered to Slaughter orally, or given on an audio tape, neither of which Dr. Johnson appeared to attempt.

Dr. Drogin commented on Dr. Johnson's testimony regarding Slaughter's alleged history of drug and alcohol abuse. Dr. Drogin testified that at the time that Dr. Johnson evaluated Slaughter, there were objective tests for drug and alcohol abuse, including subtests of the MMPI and a test for substance abuse known as the Alcohol Use Inventory. However, Dr. Drogin found no evidence that Dr. Johnson used any of the readily available objective tests to determine drug or alcohol abuse.

Most troubling is the fact that Slaughter received a score indicating that his competency was "borderline" on the Competency Screening Test. Dr. Johnson indicated on Slaughter's score sheet that "[m]ore clarification is needed on the competency to stand trial assessment instrument." Dr. Drogin testified that there was no indication that Dr. Johnson

took further steps to determine Slaughter's competency to stand trial. The fact that Slaughter's competency level was "borderline" was never reported to the trial court in Dr. Johnson's report.

Regarding Dr. Johnson's evaluations, Dr. Drogin testified that he did not have confidence in Dr. Johnson's diagnoses. Dr. Drogin testified that if a psychologist is unable to reach a conclusion based on testing, he should try to obtain additional information. If a psychologist were still unable to reach a conclusion based on the evidence in his possession, he should note that inability in the report, and decline to draw a conclusion regarding the patient. Dr. Johnson failed to do so.

Dr. Engum, a clinical psychologist specializing in neuropsychology and forensic psychology, also testified at the RCr 11.42 hearing. He too strongly disagreed with each of Dr. Johnson's conclusions. Dr. Egnum conducted a series of objective, standardized tests on Slaughter, including the Wechsler Intelligence Scale Revised Test on IQ, the Halstead Reitan Neurological Battery test of neuropsychological functioning, and a variety of ancillary assessment techniques of learning, memory, problem-solving, conceptual reading, motor speed, coordination and academic skills.

Based on Slaughter's test results and the Diagnostic and Statistical Manual (Fourth Edition), Dr. Engum diagnosed Slaughter with a cognitive disorder, not otherwise specified (NOS), and attention deficit disorder. Dr. Engum testified that as far as he could determine, Slaughter's cognitive disorder was the result of a brain injury, based on the "depressed skull fracture, [and] the localization on the right frontal lobe." Dr. Engum testified that a cognitive disorder could have an impact on a person's ability to understand

legal concepts, such as those implicated by the *Miranda* warnings, mitigation, and aggravation.

Additionally, Dr. Engum conducted a personality assessment, using standardized actuarial objective personality tests, such as the Minnesota Multiphasic Personality Inventory (which he described as the "gold standard" for personality tests) and the Meyer Clinical Multiaxil Inventory. Based on the personality tests, Dr. Engum concluded that Slaughter has a paranoid personality disorder, which was a result of his background, where "survival is an important aspect of daily existence." Dr. Engum testified that Slaughter's childhood had "lots of threats in the environment," "lots of reasons to distrust people and things," and was a place where "not a lot of importance [was] put upon things such as academic achievement or more of what we consider the middle class kinds of values."

Significantly, Dr. Engum testified that Slaughter was not a sociopath. Dr. Engum also testified that he disagreed with Dr. Johnson's conclusion that Slaughter has borderline personality disorder; based on Dr. Johnson's reports, Dr. Engum testified that he had not performed any tests that would allow him to conclude validly that Slaughter had borderline personality disorder. Dr. Engum also disagreed with Dr. Johnson's conclusion that Slaughter would not be a good candidate for rehabilitation. Based on the results of the Meyer Clinical Multiaxil Inventory, the MMPI, and the Personality Assessment Inventory, Dr. Engum testified that he believed Slaughter could overcome the vast majority of his problems if placed in the right environment. Further, Dr. Engum pointed to Slaughter's scores on the Wechsler Adult Intelligence Scale, particularly his scores on the social comprehension and judgment sub-tests, and the picture arrangement sub-test. Dr. Engum testified that Slaughter's

high scores on these tests indicate that he has social judgment, social comprehension, and a strong sense of cause and effect, all of which would make him a good candidate for rehabilitation. Dr. Engum also indicated a lack of a major psychopathology and the lack of significant drug or alcohol problems. Finally, he testified that to the extent that the science of predicting future violent behavior would allow, Dr. Engum believed that Slaughter would neither kill someone in a penitentiary, nor kill someone in the community.

Lane Veltkamp, a clinical social worker at the Department of Psychiatry at the University of Kentucky Medical Center, described Slaughter's relationship with his father as one of "abandonment and neglect [ ]." Slaughter's father was "in no way involved" in Slaughter's life. Veltkamp testified that because Slaughter's father was absent, Slaughter did not have the benefit of a male role model. Veltkamp testified that when Slaughter was eight or nine, he was put in charge of his younger brothers. He testified that although Slaughter did take significant responsibility for his brothers, including providing food and supervision, Slaughter was too young for that level of responsibility. Veltkamp testified that this "role reversal" is very wearing on a child. As a result of his obligations at home, Slaughter often slept in school, and had a variety of problems.

Veltkamp and Dr. Gary Kearl, a medical doctor specializing in family medicine and the treatment of children who may be the victims of sexual and physical abuse, testified as to the extent of the physical abuse Slaughter received. Veltkamp testified that Slaughter has "scars all over his body and was hit with belts and extension cords and slapped and so on." Upon examination, Dr.Kearl observed a number of scars on Slaughter's back, shoulders, chest, lower legs, forearms and

thighs. These scars were consistent with Bobby and Vincent's testimony that as a child, Slaughter had been beaten with braided switches, leather belts and extension cords. Dr. Kearl testified that the lacerations on Slaughter's forearm also suggested neglect; the size of the scar indicated that Slaughter received a wide cut that was not sutured. Dr. Kearl testified that the particular laceration was so deep that it cut through the underlying muscle.

Dr. Kearl also observed a scar on Slaughter's head at the hairline, consistent with Mary Moon's testimony that Slaughter had incurred a head injury. Slaughter told Dr. Kearl that he had trouble sleeping at night, had difficulty seeing objects that were far away, and that he had suffered from recurring headaches ever since he was a young child. Dr. Kearl testified that beneath the scar, Slaughter's skull was depressed. Dr. Kearl expressed concern that Slaughter's skull was not x-rayed at the time of the injury; not only did the failure to seek medical care indicate abuse,[6] but conventional skull films would have shown how deep or severe Slaughter's skull fracture was, and whether surgery was needed to place the skull bones back in their original position. Such films would have also helped determine whether there was an underlying accumulation of blood, known as a hematoma, which could cause brain damage. "If it were there and it were not treated properly, that could have resulted then in brain damage and subsequent decreased reasonability." Dr. Kearl testified that Slaughter still has a depressed skull fracture.

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[6] The family's poverty should not have prevented Slaughter from receiving treatment. Dr. Kearl testified that in the late 1960s, there were a number of hospitals in Slaughter's area that would have accepted Slaughter as a patient.

II.

In *Strickland,* the Supreme Court explicitly set forth the test for determining whether ineffective assistance of counsel prejudiced a criminal defendant. "When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695, 104 S. Ct. 2052. This test does not require that Slaughter prove that it is more likely than not that he would have received a life sentence if not for the deficient performance of counsel; the Supreme Court has explicitly rejected such a stringent test for prejudice. *Strickland,* 466 U.S. at 693, 104 S. Ct. 2052 ("[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case."). *See also Hodge v. Hurley,* 426 F.3d 368, 376 n.18 (6th Cir. 2005) (noting that the *Strickland* standard requires less than a preponderance of the evidence); *Harries v. Bell,* 417 F.3d 631, 639 (6th Cir. 2005) (holding that petitioner need not show that counsel's deficient performance more likely than not altered the outcome); *Bigelow v. Williams,* 367 F.3d 562, 570 (6th Cir. 2004) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome, but something less than a showing that the outcome more likely than not would have been different.") (citations omitted); *Coleman v. Mitchell,* 268 F.3d 417, 452 (6th Cir. 2001) (*Strickland* "does not require showing that counsel's unreasonable performance more likely than not altered the outcome in the case."). Applying this standard, we must only ask whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 at 694, 104 S. Ct. 2052. "A reasonable probability is a probability

sufficient to undermine confidence in the outcome." *Id.*

Given the voluminous amount of mitigating evidence presented at the post-conviction proceeding, and the shockingly paltry and negative evidence presented during the penalty phase of the trial, there is clearly a reasonable probability that the jury would have sentenced Slaughter to life imprisonment had it been presented with the evidence that was presented at the RCr 11.42 hearing. Contrary to the assertion by the majority, the evidence presented in the post-conviction hearing did not merely expound on that presented during the penalty phase. Notably, Dr. Engum disagreed with Dr. Johnson's conclusions that Slaughter suffered from borderline personality disorder, and would not be a good candidate for rehabilitation. He further disagreed with Dr. Johnson's conclusion that Slaughter was predisposed toward violence.

Furthermore, nothing in the testimony presented during the penalty phase suggested that Slaughter was a devoted son and brother. Nothing suggested that he had family that was willing, let alone eager, to testify on his behalf. In fact, the jury heard testimony that Slaughter had not formed meaningful relationships with family members. Although Slaughter testified that his mother beat him, his testimony did not reveal the extent to which he was neglected as a child. The penalty phase testimony did not reveal that Slaughter had a learning disability, nor did it reveal that Slaughter suffered from a significant head injury as a child.

The majority opines that the jury learned all it needed about Slaughter's background from the testimony of Slaughter and Dr. Johnson. Our precedent makes clear, however, that a defendant can be prejudiced by counsel's deficient presentation of mitigating evidence even when *some*

mitigation is presented to the jury. *See Harries v. Bell,* 417 F.3d 631, 639-40 (6th Cir. 2005) (holding that defendant was prejudiced by counsel's failure to present mitigating evidence on traumatic childhood, physical abuse, and head injury, despite the fact that defendant and a psychiatrist offered mitigating testimony during the trial[7]). Furthermore, we have held that a defendant can be prejudiced when trial counsel fails to adduce enough information regarding mitigating circumstances, despite the fact that the jury is made aware of the bare contours of a defendant's woeful history. *See Glenn v. Tate,* 71 F.3d 1204, 1207 (6th Cir. 1996) ("Here the jury was given virtually no information on [the defendant's] history, character, background and organic brain damage-at least no information of a sort calculated to raise reasonable doubt as to whether this young man ought to be put to death."). In *Glenn,* a minister, teacher and lawyer testified on the defendant's behalf. *Glenn,* 71 F.3d at 1207. As Slaughter did, Glenn testified on his own behalf. *Id.* at 1208. As in the instant case, none of the testimony revealed that the defendant may have suffered from brain damage. *Glenn,* 71 F.3d at 1210. As was the case here, Glenn's trial counsel never talked to his siblings or family members. *Glenn,* 71 F.3d at 1208.

The majority's denial of the writ runs counter to the relief granted in *Hamblin v. Mitchell,* 354 F.3d 482 (6th Cir. 2003). There, as here, post-conviction proceedings revealed a wealth of mitigation that was not presented to the jury during the penalty phase. There, as here, trial counsel put on a pathetic display of largely negative evidence during the penalty phase. *Id.* at 491. Slaughter, like Hamblin, grew up in

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[7] See *Harries v. State,* 958 S.W.2d 799, 806-08 (Tenn. Crim. App. 1997), for a discussion of the mitigation presented at trial.

extreme poverty and neglect. *Id.* at 490. They both lived with an abusive, alcoholic father who beat their mother. They were both left to fend for themselves, without the supervision or assistance of their mother. Both attempted to care for younger siblings. Neither received a proper education. They both started getting into trouble with the law as teenagers. Both have demonstrated psychological problems. Both suffered from a severe blow to the head during childhood. In both cases, extraordinary mitigating evidence was only revealed in post-conviction proceedings. Like the petitioner in *Hamblin,* Slaughter was prejudiced by his attorney's failure to present compelling mitigation to a jury.

In concluding that Slaughter was prejudiced by Radolovich's failure to investigate or present mitigating evidence, the district court summed up the image of Slaughter the jury must have had. Rather than seeing the man described in post-conviction proceedings,

[T]hey saw "James Earl Slaughter," in many senses, the man who never was, standing alone and defiant. Slaughter was a man [who] testified recklessly; a man who apparently was so unloved and so uncared for that not a single individual, relative or friend would vouch for him, though his life hung in the balance.

Had Radolovich investigated Slaughter's background, he would have found an entire family willing to testify on his behalf. The jury would have learned that Slaughter was abused as a child, that he cared for his younger brothers, and that he suffered a head injury. Most importantly, they would have learned that he had a family who cared about him. The district court correctly concluded that but for Radolovich's failure to investigate and present a full picture of Slaughter's

life, there is a reasonable probability that the result of the penalty phase would be different. "[T]he presentation of even a substantial subset of the mitigating evidence detailed above 'would have humanized Petitioner before the jury such that at least one juror could have found he did not deserve the death penalty.' " *Coleman v. Mitchell,* 268 F.3d 417, 452 (6th Cir. 2001) (quoting *Carter v. Bell,* 218 F.3d 581, 592 (6th Cir. 2000)).

III.

Slaughter also argues that he was denied due process and an impartial sentencing jury when the trial court allowed a juror to question him. After Slaughter testified at the penalty phase, a juror asked the following:

I have a question. He stated that he knew, he and this Red had been friends for sometime. Where did this Red live[?] He would had to visit or something. Where did this Red live? Where did he hangout at? Why didn't any of your friends know about you and Red and since you...

When Slaughter refused to answer the question to the juror's satisfaction, the juror responded: You are asking for your life and nobody can find Red and you refuse. Why do you refuse to tell his address so he can be found to save you probably?

At this point, defense counsel asked to approach the bench and interrupted the questioning. Counsel moved for a mistrial, and argued that the juror had shown a "predisposition before the close of any evidence." The trial court denied the motion. On direct appeal, the Supreme Court of Kentucky rejected Slaughter's argument. That court noted that Slaughter did not testify during the guilt phase, and that the question took place during the sentencing phase

after Slaughter had been found guilty. Relying on Kentucky law, that court then held that it is proper for jurors to ask questions of the defendant. The state court did not address the issue as a matter of constitutional law. The Supreme Court of Kentucky declined to consider the issue upon a RCr 11.42 motion, because it had considered the issue on direct appeal.

The extent of Slaughter's constitutional argument before the Kentucky Supreme Court was a reference to due process, followed by a citation to the Fourth and Sixth Amendment. Relying on *Levine v. Torvik,* 986 F.2d 1506 (6th Cir. 1993), *abrogated on other grounds by Thompson v. Keohane,* 516 U.S. 99, 111, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995), Slaughter now argues that a federal claim is fairly presented if a petitioner cites to a provision of the U.S. Constitution. *Id.* at 1516 (holding that a habeas petitioner properly presented his federal claim in state court insofar as he alleged that due process prohibits confinement of a person found not guilty by reason of insanity when that person is no longer mentally ill); *Franklin v. Rose,* 811 F.2d 322, 326 (6th Cir. 1987) ("The ways in which a state defendant may fairly present to the state courts the constitutional nature of his claim, even without citing chapter and verse of the Constitution, include (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts well within the mainstream of constitutional litigation." (emphasis omitted)). *See also, Purnell v. Missouri Dept. of Corrs.,* 753 F.2d 703, 706 (8th Cir. 1985) ("[R]eference to the Constitution, a federal case, *or* a specific constitutional right [is required] to meet the 'fair presentation' and 'fair opportunity tests.' ") (emphasis

added); *Petrucelli v. Coombe,* 735 F.2d 684, 688-87 (2d. Cir. 1984) ("It is not necessary for a habeas petitioner to cite 'book and verse' of the Constitution," in order to put state court on notice that they are to decide federal constitutional claims).

Before the Kentucky Supreme Court, Slaughter argued: "Based on this denial of due process and a fair trial by an impartial jury, appellant is entitled to a new trial. 14th and 6th Amendments. Section 11 of the Kentucky Constitution." Under *Levine,* Slaughter sufficiently notified the state court of his federal argument by citing a provision of the United States Constitution. *See Levine,* 986 F.2d at 1516. *See also Newton v. Million,* 349 F.3d 873, 877 (6th Cir. 2003) ("There is no requirement that the petitioner cite to cases that employ federal constitutional analysis where he has phrased his claim in terms of a denial of a specific constitutional right."). This holding is entirely consistent with *Blackmon v. Booker,* 394 F.3d 399, 400 (6th Cir. 2004), in which the petitioner did not cite a specific provision of the Constitution. To the extent that *Blackmon* is inconsistent with *Levine* 's holding that citation to a provision of the Constitution is sufficient to preserve a claim based on federal law, we are obligated to follow *Levine. See Sowards v. Loudon County, Tenn.,* 203 F.3d 426, 431 n.1 (6th Cir. 2000) ("When a later decision from this court conflicts with its prior decisions, the earlier cases control.").

The majority argues that this case is distinguishable from *Dye v. Hofbauer,* --- U.S. ----, 126 S. Ct. 5, 163 L. Ed. 2d 1 (2005), in which the Supreme Court reversed our holding that a petitioner had failed to preserve his federal claim in the state court. Although this case is certainly distinguishable, the majority would ignore the remaining body of Supreme Court precedent. Thus, we must take heed of the Supreme

Court's instruction in *Baldwin v. Reese,* 541 U.S. 27, 31, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004), which informs us that:

A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal."

In fact, Supreme Court precedent informs us that Slaughter may have in fact gone above and beyond what is required under the law to preserve his federal claim. "[T]o state a federal due process claim it is not necessary to invoke the talismanic phrase 'due process of law' or cite book and verse of the federal constitution." *Duncan v. Henry,* 513 U.S. 364, 365, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) (citations omitted). Slaughter not only invoked due process, but he cited the specific book and verse of the federal constitution, a step explicitly cited as unnecessary by the Supreme Court. To the extent that the law of our circuit requires more, it conflicts with Supreme Court precedent and obviously cannot bind this court. *See Johnson v. City of Cincinnati,* 310 F.3d 484, 501 (6th Cir. 2002).

IV.

Because the majority turns a blind eye to the breadth and depth of mitigating evidence presented during the RCr 11.42 hearing, all of which have been presented during the penalty phase, and because the majority ignores Supreme Court precedent as to the action a defendant must take to preserve his federal claim, I respectfully dissent.

Appendix B

United States District Court, W.D. Kentucky,
at Louisville.
James Earl SLAUGHTER, Petitioner,
v.
Phillip PARKER, Warden, Respondent.
No. 3:00CV-P227-C.

Sept. 27, 2001.

MEMORANDUM OPINION AND ORDER

INTRODUCTION

This matter is before the District Court to consider the motion for summary judgment filed by the Respondent Warden. The Warden has moved to dismiss the federal habeas petition filed by Petitioner, James Earl Slaughter. [1] Slaughter is a state prisoner currently on death row in Kentucky for his role in the robbery and murder of a Louisville consignment-store owner, Esther Stewart, on January 28, 1983.

A jury convicted Slaughter on both charges in 1983. The trial court sentenced him to twenty years' imprisonment for first-degree robbery and to death for murder.

The Supreme Court of Kentucky affirmed the conviction and sentence on direct appeal. *Slaughter v. Commonwealth,* 744

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[1] Petitioner's true name is not James Earl Slaughter. His legal name is Jeffrey Devane Leonard. Because the state court decisions repeatedly refer to Petitioner by his alias, this Opinion will also use the alias.

S.W.2d 407 (Ky. 1987), *cert. denied,* 490 U.S. 1113, 109 S. Ct. 3174, 104 L. Ed. 2d 1036 (1989). Slaughter filed a post-conviction motion to vacate, set aside or correct the judgment. *See* RCr 11.42. Following an extended evidentiary hearing in 1994, the trial court overruled the motion. The Supreme Court of Kentucky affirmed the decision to deny post-conviction relief. *Slaughter v. Commonwealth,* Appeal No. 96-SC-0049-MR (Ky., rendered April 27, 1999) (unpublished disposition). Petitioner then filed the present federal habeas corpus petition which raises forty-seven grounds for relief.

Proof at Trial

Events that led to the conviction and death sentence of Petitioner occurred on Oakdale Street in Louisville, Kentucky. At the time of the robbery and murder, Petitioner lived at 3115 Oakdale Street in the apartment of Keith Edwards (TE VIII, 27-28). Edwards lived there with his sister, Laura, and his girlfriend, Paula Gibson (*Id.*). Near the apartment on the same street was a consignment store, The Clothes Rack. The victim, Esther Stewart, owned and operated The Clothes Rack (TE III, 305).

Paula Gibson recalled that on the morning of the crime, on January 28, 1983, Petitioner asked if she remembered him telling her about "that place on the corner." (TE VIII, 1032). A week earlier, Petitioner had told Gibson that he was going to rob the store on the corner (*Id.*, 1088-1089). Another prosecution witness, Terrence Preston, told police initially that Petitioner had said he planned to rob The Clothes Rack, and was not going to leave anyone behind (*Id.*, 1140). At trial, however, Preston denied telling the police that Petitioner had said this (*Id.*, 1129). According to Preston, he had heard this information from other people (*Id.*, 1130).

Laura Edwards testified that Petitioner left the apartment that afternoon at around 12:30 (TE VIII, 1029-1030). He left wearing a blue jacket and jogging pants and took with him a brown briefcase, which had a gun in it (*Id.*, 1031, 1033). He also took a butcher knife from a kitchen drawer (*Id.*). Both Laura and Paula watched him leave at about 1:00 p.m. in Keith Edwards' station wagon. Laura left the apartment soon thereafter and saw Petitioner driving in the direction of The Clothes Rack (*Id.*, 1034). She did not see him again until 1:00 a.m. the next morning, on January 29, 1983, when he returned home wearing a brown jacket and tan pants (*Id.*, 1035-1037).

At approximately 2:00 p.m. that day, Louisville police received a call about a stabbing at The Clothes Rack on Oakdale. Police discovered Esther Stewart lying dead on the front porch of the store with her arms outstretched (TE II, 294). Detective Wilson observed five stab wounds to Stewart's chest (*Id.*). There was blood on the floor inside the store, and a stool had been overturned (TE III, 404). Detective Clark discovered a .22 long-rifle bullet lying inside the front door (*Id.*, 398).

The cash drawer to the store register was jammed shut. Several police officers were required to force the drawer open (*Id.*, 410). On opening the register, police discovered that the drawer contained cash (*Id.*). A money bag containing cash and Stewart's purse were found under the cash register (*Id.*, 410-411). The purse, which was found behind a sliding drawer, was open and contained no money (*Id.*, 421). The corner of Stewart's empty wallet was sticking out of the top of the purse.

Several witnesses in the area at the time of the crime testified

at trial. Two black females approached Officer VanMeter when he arrived at the scene and gave him the description of a thin, white male they saw running north on Oakdale with a knife in his hand (TE III, 385-387). Both woman, Jacelyn Davis and Scoshia Spence, were interviewed by police (TE IV, 430).

Davis described the suspect as being a white male in his early twenties, approximately 5 7 tall, with a thin build and light blond, shaggy hair, cut collar-length (*Id.*, 431-432). She described the young man as being very pale with bushy eyebrows and wearing Levis, a dark blue jacket and a dark blue skull cap (Id.). The jacket appeared to be dirty, and the man's nose looked red as if he had a cold (*Id.*, 432-433). Davis later identified a dark blue, down coat and dark blue toboggan seized from Slaughter as looking the like the clothes worn by the man she had seen running from the store (*Id.*, 439-440). Davis was certain that the man she saw was white and testified that she had a good look at his face and would never forget what he looked like (*Id.*, 450).

Scoshia Spence advised Detective Sherrard that she did not see the face of the man who was running near the store, but she thought that he was a white male in his late teens or early twenties, approximately 5 6 tall, thin, wearing a blue toboggan, a blue ski jacket and blue jeans, with blond hair which hung over his collar (TE IV, 482-483). Spence described the man's jacket as being medium blue with dirt or stains on the front of it. She described the jacket as being a waist-length jacket that was very puffy. The jacket had a seam that ran vertically down the outside of the arm (TE IV, 483). She saw this individual one-half block from The Clothes Rack (*Id.*, 484).

Officer Carlin testified that when he and his partner, Officer

VanMeter, arrived on the scene that day, a man approached him and told him that he had seen several white persons acting suspiciously around an automobile across the street from The Clothes Rack (TE III, 347-349). The man told Officer Carlin that one of the white suspects had a knife and appeared to be wiping blood off of it (*Id.*, 353).

Ronald Vittle was the owner of the Zippy Food Mart, located across the street from The Clothes Rack (TE V, 586-587). Vittle and another local business man were standing on the street immediately after the victim was stabbed (*Id.*, 588). Vittle testified that he saw a 25-year-old, white male, who said something suspicious (*Id.*). The man got into a car with two other people. It looked to Vittle like he was wiping something off on the front seat of the car (*Id.*). The car was parked in a lot directly across the street from the store (*Id.*, 588-589).

During the trial, defense counsel advised the court that a woman, Irene Schuble, contacted him claiming that her neighbor, Ann Fowler, had told her that she saw a white man running from The Clothes Rack on the day of the murder (TE VI, 829, 833-837). Her neighbor, however, refused to go to the police and did not wish to become involved. Schuble testified to these events at Petitioner's trial. Her neighbor, Ann Fowler, however, testified that she knew nothing about the incident at The Clothes Rack, was not at the scene that day, and had never told Schuble or anyone else that she had witnessed any portion of the events that took place at The Clothes Rack (*Id.*, 812-814, 817, 821). Schuble's boyfriend, John Cockrel, testified in rebuttal that he had overheard conversations between Fowler and Schuble about the murder at The Clothes Rack. Fowler allegedly said she had seen the man when she was in the area of the beauty shop; and, that if it was a black man who ran from the building, it was the

whitest black man she had ever seen (*Id.*, 846-849).

Still another witness, Preston Siler, testified that he was riding his bicycle in the area of the store between 1:30 p.m. and 2:00 p.m. that day (TE VII, 874-876). Siler saw a black male running from The Clothes Rack. The man looked as if he were attempting to hide something (*Id.*, 881-882). He appeared to have blood on him. Siler did not see the man's face (*Id.*, 913). He told the police that the man he saw that day could have been Puerto Rican (*Id.*).

Ann Ditsch worked three doors down from The Clothes Rack (TE VII, 1009-1010). Periodically, she would shop at The Clothes Rack during her lunch hour (*Id.*). Ditsch testified that about three days before Stewart was murdered, she saw Slaughter in The Clothes Rack (*Id.*, 10100-1015).

When Petitioner returned home, Paula Gibson noticed that he changed his clothes before going out (TE VIII, 1090). Gibson later discovered a broken gun under some dirty clothes in the bathroom of the apartment (*Id.*, 1100). After Keith Edwards learned about the broken gun, he told his sister to throw the gun into the back yard (*Id.*). Laura Edwards testified that when she again saw Petitioner at 1:00 a.m., the following morning, on January 29th, she took the car keys from Petitioner as her brother had told her to do (*Id.*, 1036-1037). She also noticed a spot of blood on Petitioner's pants (*Id.*, 1037). That same morning, Paula noticed a shirt soaking in the bathroom sink of the apartment. She also noticed some blood on Petitioner's pants (*Id.*, 1093). In the kitchen sink, she noticed a knife, which none of them had used the day before (*Id.*, 1096, 1098).

Keith Edwards did not return to the apartment until 5:30 a.m., in the morning of the day after the crime (TE VIII,

1093). Edwards also noticed blood on Petitioner's jogging pants in the bathroom and saw the pieces of he broken gun. On Saturday, January 29, 1983, Petitioner left the apartment around 4:30 p.m., saying that he was going to visit his father (*Id.*, 1044). Instead, Petitioner went to visit Keith Edwards at his workplace (*Id.*, 1177). Petitioner had earlier told Edwards, the day before, that he knew nothing about the woman getting killed at The Clothes Rack (*Id.*, 1175). However, when Petitioner met Edwards on the 29th, Edwards again asked him about the murder (*Id.*, 1178).

Edwards testified that in response to this question, Petitioner told Edwards that he went down the street and robbed the woman at The Clothes Rack (TE VIII, 1178). According to Petitioner, he walked up behind the owner, and after talking to her briefly, grabbed her while demanding to know where the money was (*Id.*) She began to scream and told him she had no money (*Id.*). Edwards testified that Petitioner then told him that he then hit the victim with the gun, but the blow had no effect on her. He next put the knife to her throat, and again, demanded to know where the money was located (*Id.*, 1179). She begged Petitioner not to hurt her and began to scream again. Petitioner then stabbed her several times and ran out of the store (*Id.*). According to Edwards, Petitioner told him that he stabbed Stewart once in the back and several times in other places (*Id.*, 1191).

As soon as Petitioner left, Keith Edwards called the police to advise them what he had learned (TE VIII, 1183). Sgt. Robert Barker took the call from Edwards (Vol.V, 641). Edwards advised Sgt. Barker that Petitioner had Edwards's automobile and was involved in the robbery-murder at The Clothes Rack (*Id.*, 611-612). Lt. Wolfe and Sgt. Barker then went to Edwards's apartment (*Id.*, 613-614). They arrived at the same time that Petitioner arrived there. Lt. Wolfe advised

Laura Edwards that the police were looking for a white male involved in a murder at The Clothes Rack (*Id.*, 614). Edwards said that she did not know anything about a white male, but Petitioner had left the apartment around noon the preceding day and was wearing the same kind of clothes that the killer was wearing (*Id.*, 615). Lt. Wolfe noticed that one of Petitioner's shoes appeared to have a small bloodstain on it (*Id.*, 616).

Lt. Wolfe asked Petitioner to get the jacket he had been wearing before. Petitioner returned with a nylon jacket from the closet. Officer Pike took him into another room to talk with him (TE V, 616-617). Laura Edwards then advised Lt. Wolfe that the nylon jacket that Petitioner had brought out was not the one that he had worn the day before (*Id.*). Edwards went to the closet and got the medium blue jacket that she saw Petitioner wearing (*Id.*, 617). The jacket appeared to have bloodstains on it (*Id.*). Petitioner was then formally arrested for robbery and murder (*Id.*). Edwards directed Lt. Wolfe to the other clothes that Petitioner had been wearing. She advised Lt. Wolfe that Petitioner had soaked the shirt overnight to get the blood out of it (*Id.*, 618). Some of the other clothes appeared to have bloodstains on them.

Petitioner made several different statements to police about the details of his involvement in the events at The Clothes Rack on January 28, 1993. While in the holding room at the police station, Petitioner told Lt. Wolfe one version of events. He said that he was driving Keith Edwards's automobile that day, looking for a purse to snatch (TE V, 619). Petitioner picked up a white male. As the two men rode around, the white male talked about robbing The Clothes Rack (*Id.*, 619-620). Petitioner told Lt. Wolfe that he changed clothes and shoes with this individual and got out of the automobile at

Edwards's apartment (*Id.*, 620). The white male then drove off in Edwards's car, only to return later and switch clothes again with Petitioner (*Id.*).

Lt. Wolfe delivered Petitioner to the homicide office at the police department. Petitioner was interviewed by Detectives Sherrard and Duff. Detective Sherrard testified that he interviewed Petitioner and told him that Keith Edwards had already said that Petitioner admitted killing the store owner, and that Petitioner was the only one involved in the robbery-murder (TE IV, 514). Petitioner denied any involvement in the crime during the interview (*Id.*, 515). He told Detective Sherrard that he did not know who the white male was (*Id.*). Petitioner also denied lending his clothes or Keith Edwards's car to this individual and accused the police officers of lying when they said he made such statements (*Id.*, 515-516).

Detective Duff took Petitioner into his office to interview him alone (TE IV, 516). Duff returned at approximately 9:40 p.m. and advised that Petitioner had changed his story (*Id.*). Petitioner told Detective Sherrard that he was a look-out during the robbery, and that the white male had entered the store to commit the offense (*Id.*). Petitioner denied that he told Detective Duff that he had gone into the store with the white male (*Id.*).

Petitioner told Detective Sherrard that he was driving Keith Edwards's station wagon at 11:30 a.m. that morning when he picked up a white male at the corner of Third and Winkler Streets (TE IV, 517). The two drove around for awhile and decided to rob The Clothes Rack (*Id.*). The two men exchanged clothing and went to the store between 1:30 and 2:00 p.m. Petitioner told Detective Sherrard that the white male had entered the store alone, and that he had remained standing outside on the front porch (*Id.*). Shortly thereafter,

Petitioner heard screaming from inside the store (*Id.*). The white male ran from the front door of the store, and the two men ran side by side northward down Oakdale Street and through an alley to where the car was located (*Id.*). Upon arriving at the automobile, they traded clothing and then drove around for awhile. Petitioner then let the white male out at a game room in the Cardinal Shopping Center (*Id.*).

Petitioner told Detective Sherrard that he did not know who this individual was, but described him as being a white male in his early 20s, very thin, with dark-blond hair (TE IV, 519). Petitioner advised the detective that he thought that this man was called "Red." Detectives Sherrard and Hale later went to the game room on January 31, 1983, to look for "Red," but were unable to find anyone matching that description (TE IV, 520-521).

Detective Duff also testified concerning the statements made by Petitioner, following his arrest. Detective Duff testified that Petitioner told him that he had picked up a white male hitchhiking, and that they had discussed ripping people off (TE IV, 536). According to Duff, Petitioner told him that the white male had asked Petitioner if he wanted to pull a job. Petitioner allegedly responded that he did not, but would help (*Id.*). Petitioner told Duff that he had parked in front of Edwards' apartment and had exchanged clothes with the white male. He also had provided him with a pistol or a rifle (*Id.*). Afterwards, Petitioner went into the apartment, and the white male left (*Id.*, 536-537). A short time later, the white male returned, and the two men exchanged clothes in the automobile again (*Id.*, 537). The white male also returned the gun, which was broken (*Id.*). That was the last time that Petitioner saw the white male. He told Detective Duff that he did not know that a murder had been committed at The Clothes Rack until the following day when he saw the news

on television (*Id.*). Subsequently, however, Petitioner told the detective that he was in the store when the robbery happened, but no one was supposed to get killed (*Id.*, 538). Detective Dossett, who took a taped statement from Petitioner on January 29th, testified that Petitioner had never told him that he was in the store when the killing occurred, but that no one was supposed to be hurt (*Id.*, 550).

While Petitioner was awaiting trial in the Jefferson County Jail, he spoke with a fellow inmate, William Keller, about the crime. Keller testified at trial that he asked Petitioner why he had stabbed the victim. According to Keller, in testimony that he would later recant, Petitioner supposedly said that he stabbed the victim because he thought she was going to scream out (TE VIII, 1142-1146). Petitioner had only intended to rob her, but had become scared and stabbed her (*Id.*).

Serologist, William Durbin, testified concerning the blood found on the jogging pants, black pants, tan pants, jogging shoes and rifle barrel (TE VI, 781-783). Durbin testified that with the exception of the right jogging shoe, the blood found on all of these items was the same blood-type as that of Esther Stewart (*Id.*, 782-783). Further, the toboggan and the shirt contained head hairs of a black person that matched Petitioner's hair characteristics (*Id.*, 784). A left-hand, black glove seized by the police also contain the same blood type as the victim's, and the right-hand glove was found to contain clothing fibers similar to the fibers on a smock that the victim was wearing at the time of her death. Durbin, however, did not find any fibers on Petitioner's clothing that matched the victim's clothing (*Id.*, 801).

Dr. Weakly-Jones performed an autopsy on the victim the day after the murder (TE III, 363). The doctor testified that

the victim had multiple stab wounds and two incise wounds to the chest, back, hand and shoulder areas (*Id.*, 364). The victim also had a laceration in her scalp above her right ear (*Id.*, 366). One of the stab wounds penetrated the victim's heart and caused her death (*Id.*, 368-369).

At the close of the prosecution's case, Petitioner moved for a directed verdict of acquittal on both the robbery and murder charges (TE IX, 1215-1218, 1241-1242). His motion was overruled by the trial court. Petitioner did not testify during the guilt phase of the proceedings, nor did he put on any other proof. Instead, his attorney noted that Petitioner's version of what happened was contained in the taped statement given to Detective Dossett (*Id.*, 1233). Both sides then gave closing argument (*Id.*, 1279, 1299-1301, 1323). Following deliberation, the jury found Petitioner guilty of intentional murder and robbery in the first degree (Transcript of Record ("TR") 109, 114). The jury fixed a 20-year term of imprisonment on the first-degree robbery count. The penalty phase on the capital murder charge then began.

Petitioner testified during the penalty phase that he quit school in the seventh grade when he was twelve years old (TE IX, 1134). His father died in 1972, while serving a prison sentence for bank robbery and other crimes (*Id.*, 1346). Petitioner's mother physically abused him with numerous beatings. Consequently, he ran away from home for three years at age twelve (*Id.*, 1347). He testified, incorrectly, that his mother had died of cancer in 1980 (*Id.*, 1347-1348). He then supported himself by working in restaurants and truck stops and by stealing cars (*Id.*, 1348).

Petitioner testified that he was involved in an incident where another car thief was murdered for being a snitch (TE IX, 1348-1350). He told the jury that he had a three-year-old

daughter who lived in Houston, and that he had used illegal drugs for a long period of time, including the day before the crime was committed (*Id.*, 1351).

As for the events on January 28, 1983, Petitioner testified that "Red" wanted to see if he could "make some money at that place on the corner." (TE IX, 1351-1352). Petitioner told him there was no money in the store on the corner, and suggested that they hit the Zippy Mart (*Id.*, 1352). "Red" asked again about the store, and Petitioner again replied that there was no money there (*Id.*). When "Red" insisted on robbing the store, Petitioner agreed but said he would stay right there (*Id.*). While Petitioner was waiting outside, he heard someone screaming inside the store and took off running (*Id.*, 1353). "Red" later told Petitioner that the victim had started arguing, and he "just started cutting." (*Id.*). Petitioner explained that no one was supposed to get hurt in the robbery (*Id.*). Petitioner testified that he did not kill the victim, and that it should not have happened, and that he was sorry that it did (*Id.*, 1355). Petitioner admitted on cross-examination that he snatched purses every day when he did not have a stolen car to sell (*Id.*, 1367). He also testified that he and "Red" had stolen batteries from Keith Edwards (*Id.*, 1368).

Dr. Philip W. Johnson, a clinical psychologist employed by the Kentucky Corrections Cabinet, testified that he had examined Petitioner in May of 1983 and again in August of that year (TE X, 1380). As a result of his examination, the doctor had diagnosed Petitioner with borderline personality disorder with antisocial traits (*Id.*, 1388). He also diagnosed Petitioner with alcohol and drug abuse (*Id.*, 1387-1388). The doctor explained to the jury that individuals with borderline personality traits experience a multitude of problems in life that include problems with their families, peers, occupation

and academic achievement (*Id.*, 1389). Dr. Johnson then went on to describe Petitioner as a "marginally functioning individual." (*Id.*, 1393).

Dr. Johnson testified on examination by the defense that without treatment, Petitioner would probably continue in the same lifestyle he had lived for the past fifteen years (TE IX, 1395). The doctor added that Petitioner may have some predisposition for violent activities (*Id.*). He may not consistently view cause-and-effect in a realistic manner, resulting in gross errors in judgment (*Id.*, 1408). The doctor explained to the jury that the prospect for rehabilitation with people who have borderline personality disorders is relatively poor as a group, although the doctor could not apply that statement to any one specific individual (*Id.*, 1412-1413).

Following closing arguments, the jury fixed Petitioner's sentence at death for murder (TR 135). Petitioner's motion for a new trial was overruled. The trial court entered its final judgment on December 2, 1983 (TR 162-164). Petitioner then took a direct appeal to the Supreme Court of Kentucky. The Kentucky Supreme Court rejected all of Petitioner's twenty-nine arguments and affirmed his conviction and death sentence in *Slaughter v. Commonwealth,* 744 S.W.2d 407 (Ky.1987).

POST-CONVICTION PROCEEDINGS

On October 13, 1989, Petitioner filed a motion pursuant to RCr 11.42 to vacate, set aside or correct the judgment of conviction (TR II, 247-266). Following briefing, the trial court held a three-day evidentiary hearing in September of 1994. The first witness to testify was Petitioner's trial counsel, Ferdinand "Fred" Radolovich (Videotape Hearing Record ("VHR"), 9/7/94, 09:30:32). Radolovich testified

that he had been practicing as an attorney since 1974 (*Id.*, 09:42:30). He became involved in Petitioner's case *pro bono* when his law partner withdrew from the case prior to trial (*Id.*, 09:31:16). Radolovich was the sole attorney to represent Petitioner during the trial (*Id.*, 09:33:20).

Radolovich testified that prior to representing Petitioner, he had worked as a state prosecutor in New York, during which time he had handled four capital cases (VHR, 9/7/94, 09:33:00). He also supposedly had handled two capital cases as a defense attorney in Kentucky (*Id.*). This testimony proved to be materially incorrect, however. An affidavit from the Executive Assistant District Attorney in New York County revealed that Radolovich had worked for the office only for less than a year beginning in 1977. During that time, he did not try *any* capital cases (*Id.*). In fact, "[g]iven Radolovich's time with the office, it was unlikely that he tried any homicide cases." (*Id.*).

Radolovich testified that his primary focus in Petitioner's case was the guilt phase of the trial (VHR, 9/7/94, 09:33:40). According to Radolovich, 99% of his trial preparation was devoted to the guilt phase (*Id.*, 09:34:30). It was his belief that if the defense was unsuccessful in the first phase of the trial, the second half of the trial, the penalty phase, would be a "blood bath." (*Id.*, 09:35:50). Radolovich testified that his plan was for Petitioner to testify during the guilt phase of the trial, and accordingly, any preparation for his testimony would have been directed at issues of guilt or innocence (*Id.*). No pretrial preparation was made for Petitioner to testify during the penalty phase of the trial (*Id.*, 09:36:49).

Concerning the penalty phase of the trial, Radolovich testified that he really didn't get a chance to prepare for the penalty phase except for the brief time after the jury returned

its verdict of guilty on the robbery and murder charges (VHR, 9/7/94, 09:37:00). At most, Radolovich spoke to only one family member of Petitioner, an elderly aunt, who lived in Georgia or Alabama, and could not attend the trial (*Id.*, 09:38:15). Radolovich did not believe that she had any helpful testimony to offer at trial, given her limited and remote contact with Petitioner. Radolovich admitted, however, that he did not think to ask the elderly aunt about any other family members who might be willing to testify for the appellant (*Id.*, 10:10:13). He admitted that it might have been helpful if he had called Petitioner's mother and brothers to testify on his behalf to show the jury that Petitioner's family still cared about him and stood by him (*Id.*, 10:11:30).

Radolovich also admitted during the hearing that he made no meaningful effort to locate any birth, school or other records of Petitioner for use in the penalty phase (VHR, 9/7/94, 09:39:00). When asked if he made any effort to locate such records, Radolovich testified, "[n]ot really, when we made our determination to focus on guilt phase, that's basically where I put my energies." (*Id.*, 09:39:00). Finally, Radolovich acknowledged that the sole expert he called during the penalty phase, Dr. Philip Johnson, gave testimony that was, in part, harmful to Petitioner (*Id.*, 10:07:50). Radolovich acknowledged that Dr. Johnson testified that Petitioner supported himself by stealing cars, and had antisocial traits, including a borderline personality that limited his potential for rehabilitation (*Id.*, 10:06:00-07:50).

Radolovich also testified concerning his preparations for the guilt phase of the trial (VHR I, 9/7/94, 09:44:10-10:01:27). Radolovich testified that he filed a motion for a competency and sanity evaluation which resulted in Dr. Johnson's report (*Id.*). He additionally filed a motion for a Bill of Particulars and a motion for production of the grand jury transcript in

order to obtain information (*Id.*). He requested a hearing to determine the existence of a proper aggravating circumstance after the Commonwealth gave notice that it would prosecute the murder as a capital offense (*Id.*). He filed a motion for individual voir dire and to sequester the jury. Further, he filed a motion for a witness list and witness statements from the prosecution (*Id.*).

Radolovich also filed a subpoena *duces tecum* to Lt. Mason to obtain mug shots of other suspects and a crank call file. He filed a motion to determine the admissibility of jailhouse informant Keller's statements. He subpoenaed the manager of Keith Edwards's place of employment, along with taped statements from the police department of every individual who gave such a statement relating to the case. He filed a written objection to the court reviewing the victim impact statement of a close relative of the victim. These motions were all filed in order to help him prepare for the trial.

Radolovich testified that Petitioner did not want to draw his friends into a criminal trial. His friends, the ones that Radolovich was able to contact, did not have any positive statements to make that would have helped the defense. Had he been able to locate anyone who would have helped by their testimony in the penalty phase, Radolovich would have called such individuals to testify (VHR I, 9/7/94).

Petitioner's mother, Mary Moon, also testified at the RCr 11.42 post-conviction hearing (VHR I, 9/7/94, 10:22:30). Moon testified that her son's name was not James Earl Slaughter. His real name, in fact, was Jeffrey Devan Leonard (*Id.*, 10:22:45).[2] According to Moon, Petitioner was born in

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[2] Apparently, neither attorney Radolovich, nor the prosecution, knew of Petitioner's actual identity until his case had been affirmed on appeal,

Alexander City, Alabama, in 1964, when she was fifteen years old and unmarried (*Id.*, 10:23:25). Petitioner's father spent only approximately one month with Petitioner before the father was killed in 1972, while serving a prison sentence (*Id.*, 10:23:40-24:10). Moon gave birth to two other sons by different fathers (*Id.*, 10:27:00). One of her husbands, Thomas Moon, to whom she was married for seven-and-a-half years, was an abusive alcoholic. She left him when Petitioner was eight years old (*Id.*, 10:31:48). Mary left when Moon fired a shotgun at Petitioner as the eight-year-old boy ran out of their home carrying his four-year-old brother (*Id.*, 10:30:18).

Mary Moon testified that Petitioner was extremely close to her mother, Susan Gibbs, and would call her once a week while she was living prior to her death in October of 1991 (VHR I, 9/7/94, 10:34:20-35:00).

Mary received little financial support from the fathers of her children. She routinely worked two jobs to support the family (VHR I, 9/7/94, 10:37:20). As a result, she was gone working from 7:30 a.m. until 10:00 p.m., many days (*Id.*, 10:37:50). Consequently, she taught the children how to cook their own meals (*Id.*, 10:37:25). When she could not leave the children with her mother, they stayed by themselves while she worked, since she could not afford a babysitter (*Id.*, 10:45:30-46:00).

Mary admitted that she "whipped the devil out of my children." (VHR I, 9/7/94, 10:48:00). She testified that if Petitioner were to pull up his shirt, you could see the scars to

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even though the police records contained mention of Petitioner's true name in the statements of a witness, who testified at trial concerning Petitioner's actual name.

prove it (*Id.*, 10:48:15). She admitted that she would whip Petitioner with anything that she could lay her hands on (*Id.*, 10:48:40). When he was five, Petitioner suffered a serious head injury when he struck his head on the corner of the refrigerator (*Id.*, 10:38:45). The wound required ten stitches to close, and Petitioner began to have severe headaches when he was nine years old (*Id.*, 10:40:00). Mary, however, lacked the money to pay for follow-up medical treatment and had no medical insurance (*Id.*, 10:40:10). According to her, Petitioner left home when he was seventeen. She had no idea where he stayed after that (*Id.*, 10:59:40).

Mary testified that she had family in Louisville, Kentucky, during the time of the trial (VHR I, 9/7/94, 10:49:30). Her father, stepmother, stepbrother, four aunts and two uncles lived in Louisville at that time (*Id.*, 10:49:35). No one, however, contacted her about testifying on her son's behalf at his trial (*Id.*, 10:50:00). Had she been contacted, Mary would have been willing to testify in support of her son, whom she loves and does not wish to see die in the electric chair (*Id.*, 10:51:30-52:15).

Bobby Moon, Petitioner's younger brother, testified that he and his two brothers grew up together in Alabama (VHR I, 9/7/94, 11:05:40). He confirmed that his mother had two full-time jobs (*Id.*, 11:06:30). While she was working, Petitioner took care of Bobby and his little brother, making sure they were fed (*Id.*, 11:07:00). When a live bullet exploded and injured Bobby's little brother, Vincent, Petitioner got Vincent to the hospital for treatment (*Id.*, 11:07:40).

Bobby testified that the boys grew up in the housing projects and had a hard life (VHR I, 9/7/94, 11:08:35). He confirmed that their mother physically punished them with belts,

switches, extension cords and brooms (*Id.*, 11:09:40). Bobby, like his mother, testified that had he known about Petitioner's trial, he is sure that he would have attended to support Petitioner (*Id.*, 11:12:00). Like his mother, Bobby loved his older brother and did not want to see him die (*Id.*, 11:18:40). Bobby and Petitioner were very close, and Petitioner had tried to help Bobby in whatever he did (*Id.*, 11:19:19).

Vincent Moon, the youngest brother, also testified at the RCr 11.42 hearing. He confirmed his mother worked two and three jobs when the boys were growing up (VHR I, 9/7/94, 11:23:25). He also confirmed that Petitioner took care of him and his older brother, Bobby, while his mother was working (*Id.*, 11:23:35). Petitioner would cook for his two younger brothers and would try to get them what they needed (*Id.*, 11:24:15). Vincent testified that when a bullet exploded in his face, Petitioner rushed him to the hospital for treatment (*Id.*, 11:25:00).

Vincent testified that he had seen his mother discipline Petitioner with extension cords (VHR I, 9/7/94, 11:27:20). She occasionally would confine the boys to their room with nothing to eat, but Petitioner would slip them food (*Id.*, 11:28:30). Vincent agreed that if he had known about Petitioner's capital trial, he would have testified for him (*Id.*, 11:30:00). Vincent, like Bobby, testified that he loves his brother and did not want to see him die (*Id.*, 11:29:40-30:10).

Charles Leonard, Petitioner's grandfather, and his grandmother, Clare Leonard, testified at the RCr 11.42 hearing (VHR I, 9/7/94, 12:59:00-13:04:41; 13:06:46-13:11:15). Charles Leonard testified that his grandson would come to visit him at his home in Louisville, and that he had stayed there on occasion, but left and did not return (*Id.*,

13:00:00, 13:00:45). When Petitioner was at the home, Charles observed that he suffered from headaches (*Id.*, 13:03:00).

Charles testified that he was never contacted about giving testimony at Petitioner's trial (VHR I, 9/7/94, 13:02:00). Likewise, Clare Leonard testified that she was never contacted by anyone about Petitioner's impending trial (*Id.*, 13:11:04-15). She was not aware that Petitioner was using the name "James Slaughter" until she saw his picture on the television (*Id.*, 13:10:40-11:01).

Dr. Eric Engum, a clinical psychologist from Knoxville, Tennessee, testified at the RCr 11.42 hearing (VHR I, 9/7/94, 13:15:00). In 1994, Dr. Engum performed a neuropsychological evaluation of Petitioner to explore the possibility of a brain injury (*Id.*, 13:24:18). Based on his examination, Dr. Engum diagnosed attention deficit disorder, along with difficulties in learning and acquiring new information, particularly, verbally (*Id.*, 13:35:00; 13:35:38). The doctor's specific diagnosis in this regard was "cognitive disorder, not otherwise specified." (*Id.*, 13:37:30).

According to Dr. Engum, an individual with Petitioner's disability cannot sit still and concentrate. He or she would have difficulty understanding legal concepts such as mitigation, aggravation and *Miranda* warnings (VHR I, 9/7/94, 13:42:00). The doctor agreed that Dr. Johnson's report reflected very poor vocabulary, thus giving reason to believe that Petitioner would not have the vocabulary skills to understand the legal terms, unless the words were expressed in a fourth- or fifth-grade vocabulary (*Id.*, 13:42:15).

Dr. Engum also administered the Minnesota Multiphasic

Personality Inventory ("MMPI") to Petitioner. The doctor testified that to conduct a competent forensic evaluation, it was absolutely necessary to administer the MMPI (VHR I, 9/7/94, 13:53:00). The doctor noted, however, that Dr. Johnson had not been able to perform the MMPI due to Petitioner's reading disability. He instead relied upon the Ink Blot Test as a substitute (*Id.*, 13:54:00-54:20). Dr. Engum testified that the Ink Blot Test is not a valid substitute for the MMPI, and it would not have permitted Dr. Johnson to conclude that Petitioner has a borderline personality disorder (*Id.*, 14:01:15). In fact, Dr. Engum testified that Dr. Johnson did not perform *any* test that would have permitted him to reach that critical conclusion (*Id.*, 14:03:50).

Dr. Engum also challenged Dr. Johnson's conclusions concerning the potential for rehabilitation. Dr. Engum testified that with proper psychotherapy, Petitioner could begin tearing down the barriers that he had developed. The doctor believed that Petitioner had sufficient intellectual development to respond to psychotherapy. Because Dr. Johnson did not obtain a valid MMPI, his diagnostic impressions were inaccurate and led him to present Petitioner to the jury in a way that was not a fair representation of Petitioner's personality (VHR I, 9/7/94, 14:51:30).

On cross-examination, Dr. Engum conceded that had he been called to testify in 1983, he would have had to tell the jury that Petitioner is impulsive, bitter and unempathetic (VHR I, 9/7/94, 14:45:39-47:38). His personal inter-relationships were short-lived and characterized by conflict due to Petitioner's significant suspiciousness and hostility (*Id.*). Further, Dr. Engum would have had to advise the jury that Petitioner's elevated antisocial skills revealed impulsive and self-destructive behaviors with little forethought to the potential consequences of the behaviors (*Id.*). Further, under

unusual circumstances, Petitioner could be expected to accept risks potentially dangerous to himself or those around him (*Id.*). He might vacillate from being very cooperative to being unable to control his anger (*Id.*). All of these items would have been in Dr. Engum's report had he participated in 1983. Finally, Dr. Engum testified that Petitioner was an extremely bright individual with a full-scale IQ of 107, which the doctor characterized as being "remarkable," given his limited academic and cultural background (*Id.*, 13:44:02-44:25). Dr. Engum concluded that Petitioner was competent, and that he acquired information at an average rate but had a better-than-average ability to retain information once acquired (*Id.*, 13:47:30-48:06).

Dr. Jerry Kearl, a Lexington physician, testified at the hearing. Dr. Kearl found no evidence of organic brain damage (VHR I, 9/7/94, 15:55:20-55:48). Dr. Kearl attributed Petitioner's insomnia to excessive caffeine and his headaches to vascular tension (*Id.*, 15:57:43-58:58). The doctor found it unlikely to believe that Petitioner's headaches were the result of a childhood injury. Physical examination by Dr. Kearl confirmed that Petitioner did have a scar at the hairline on the right side of his head, and the cranium of his skill was depressed underneath that scar (*Id.*, 15:33:20). The doctor testified that the medical attention that Petitioner received did not appear adequate for the type of injury (*Id.*, 15:36:00-39:00).

Dr. Kearl observed a large laceration on the forearm of Petitioner that appeared to be a medically neglected injury (VHR I, 9/7/94, 15:39:20). Petitioner exhibited many scars that appeared to be the result of corporal punishment he received as a child (*Id.*, 15:41:25-42:00). The doctor testified that this evidence suggested physical abuse, followed by medical neglect (*Id.*, 15:45:00). Finally, Dr. Kearl testified

that many children with attention deficit disorder or learning disabilities are abused by their parents as a result of the frustrations of trying to deal with them (*Id.*, 15:46:30).

Dr. Gayle Spears, a psychologist, testified at the RCr 11.42 hearing based on a review of Petitioner's grade records for school years 1976 through 1978, and attendance records for school years 1976 through 1979 (VHR II, 9/8/94, 09:50:27; 10:18:32-10:19:30; 10:22:34-23:06). Based on her review, Dr. Spears testified that certain patterns emerged consistent with learning-disabled students. These patterns included deterioration of academic performance, a drop in school attendance and deterioration of behavior (*Id.*, 09:50:40). According to Dr. Spears, individuals with learning disabilities are able to perform fairly well in the earlier grades, but as the requirements become increasingly difficult, they begin to encounter educational performance problems. Such students lose interest, and their attentiveness and behavior begin to deteriorate (*Id.*, 09:51:00).

Dr. Spears added that even a person with an IQ higher than 107 could have poor academic performance in a specific area, such as reading, due to a learning disability (VHR II, 9/8/94, 09:53:55). Dr. Spears reviewed a videotape of a school official from Alexander City, Alabama, discussing the state of the public schools during the time that Petitioner attended them (*Id.*, 10:00:35). Alexander City was located in the poorest county in Alabama, and had a complete lack of educational resources, materials and supplies (*Id.*, 10:01:00-10). The school system had no special resources or any training or expertise for students with learning disabilities, and there was no effort to identify such students (*Id.*, 10:01:45). Further, even had such students been identified as special-needs students, they would not have received any additional learning resources (*Id.*, 10:02:15). Such students

were more likely to be viewed as uninterested, unmotivated students with limited capability and behavior problems (*Id.*, 10:03:00). Dr. Spears agreed that patterns of attention deficit disorder were reflected in Petitioner's school records, and that without proper intervention, such problems can have a devastating effect on a child's education (*Id.*, 10:05:30). Finally, she testified that persons with attention deficit disorder respond well to structure, such as the structure available in prison (*Id.*, 10:11:00).

Lane Veltkamp, a licensed clinical social worker, performed a psychosocial evaluation of Petitioner (VHR II, 9/8/94, 10:35:50). Veltkamp described Petitioner's relationship with his father as being one of abandonment and neglect (*Id.*, 10:44:40). Due to her work schedule, Petitioner's mother simply was not available to her children (*Id.*, 10:48:10). As a result, Petitioner was forced to take responsibility for raising his brothers when he was far too young (*Id.*, 10:49:25). To complicate matters, his mother was physically abusive (*Id.*, 10:48:58). As a result of the neglect and abuse, Petitioner was distrustful and experienced difficulty in becoming close to people. Petitioner would be expected to have a great deal of anger and rage, although with therapy, his problems could be overcome over time (*Id.*, 10:52:25-53:26). Veltkamp added that Petitioner was basically a follower with little esteem and self-confidence (*Id.*, 11:00:00).

Dr. Eric Drogin, a licensed clinical psychologist, also testified (VHR II, 9/8/94, 13:17:20). Dr. Drogin reviewed both the evaluation report prepared by Dr. Johnson and Dr. Johnson's trial testimony (*Id.*). Dr. Drogin was not able to endorse the conclusions reached in Dr. Johnson's trial testimony (*Id.*, 14:03:30). However, Dr. Drogin did not know whether Dr. Johnson's ultimate diagnosis in 1983 was correct (*Id.*, 14:12:26-13:10).

Following Petitioner's conviction in 1983, William Keller provided the defense with two affidavits. In the affidavits, he admitted that the testimony he provided for the prosecution concerning Petitioner's alleged admission that he stabbed the victim was not entirely true. Keller was called by Petitioner to be a witness at the RCr 11.42 evidentiary hearing (VHR II, 9/8/94, 14:20:30). Prosecutors, however, threatened to prosecute Keller for perjury and for being a persistent felony offender if he testified inconsistently with his trial testimony (TR VIII, 819). The court advised Keller that he could be prosecuted for perjury if he testified at the RCr 11.42 hearing, contrary to his trial testimony (*Id.*, 14:20:40). Keller subsequently invoked his Fifth Amendment rights (*Id.*, 14:33:00).

In an affidavit prepared after the RCr 11.42 hearing, Keller admitted that he had lied during Petitioner's trial, that Petitioner had not admitted stabbing the victim, but stated that he was too nervous to testify at the evidentiary hearing after being told that he could be prosecuted for perjury. Although Keller felt bad about his false trial testimony, he was not willing to subject himself to the possibility of additional prison time due to that testimony.

Attorney, Betty Niemi, testified on the question of ineffective assistance of counsel (VHR II, 9/8/94, 14:49:04). Niemi, a Kentucky criminal defense attorney who has defended several capital murder cases, testified that she had reviewed the entire criminal trial record, the defense counsel's entire trial, and the materials submitted with the RCr 11.42 motion (*Id.*, 14:49:50). In her opinion, Petitioner did not receive effective assistance of counsel during the guilt phase or the penalty phase of the trial (*Id.*, 14:52:23; 15:26:55). In her view, defense counsel was deficient during jury selection,

failed to do an adequate voir dire, failed to obtain an independent mental health expert and failed to make adequate preparation for the penalty phase of the trial (*Id.*, 14:53:30-15:12:30).

Niemi testified that a defense attorney in a death penalty case must begin preparing for the penalty phase on the day the case is received (VHR II, 9/8/94, 15:12:30). In her words, "you have to anticipate making it to the penalty phase because if you don't you're gonna be caught totally inadequate." (*Id.*, 15:12:40). The types of preparation she gave examples of included: considering the social history of your client from the day he was born until he walks into the courtroom; obtaining birth, school, medical and employment records; and talking to family members, school teachers, ministers and neighbors (*Id.*, 15:12:50-15:13:00). Gathering such information, according to Niemi, is essential in developing a strategy (*Id.*, 15:13:30). Niemi noted that information was available in the record to defense counsel at the time which would have revealed his client's true name as being Jeffrey Leonard (*Id.*, 15:13:40-15:16:25).

Niemi testified that it is a questionable defense practice to have a client evaluated at Kentucky Correctional Psychiatric Center, because the information obtained is not confidential, and KCPC does not act as a defense expert (VHR II, 9/8/94, 15:13:55). Niemi agreed, based on the post-conviction affidavit of defense counsel, that the entire focus appeared to have been on the guilt phase (*Id.*, 15:27:10). After the guilty verdict was returned, the penalty phase became something of a sudden afterthought (*Id.*, 15:27:30). Niemi charactered Dr. Johnson's testimony as being "devastating" to Petitioner, who was not prepared adequately to testify in the penalty phase and was not aware of either his role in the process or the nature of mitigating evidence (*Id.*, 15:28:10).

On June 22, 1995, the trial court entered an opinion overruling Petitioner's RCr 11.42 motion (TR VI, 859-865). In its opinion, the trial court noted that the hearing had revealed an impressive display of mitigating evidence (*Id.*, 861). In fact, the court wrote that it had never been presented at trial with such an accumulation of mitigating evidence during a penalty phase (*Id.*, 863). The court, however, concluded that it was unpersuaded that in 1983, the now-mitigating evidence would have changed the jury's verdict (*Id.*, 863-864).

Petitioner took an appeal to the Supreme Court of Kentucky. On post-conviction appeal, the Supreme Court affirmed the decision of the trial court. *Slaughter v. Commonwealth* (Ky.1998). Petitioner then filed his present federal habeas petition in which he raises forty-seven claims of error. Respondent has filed a motion for summary judgment that requests the dismissal of the petition. Petitioner has responded. Accordingly, the matter is ripe for consideration.

LEGAL ANALYSIS

Legal analysis of Slaughter's claims presents a substantial challenge. Slaughter raises forty-seven separate claims of error in his 281-page memorandum. Virtually every aspect of the trial proceedings has been challenged. For example, Slaughter raises three arguments involving pretrial hearings,[3] four arguments involving the jury selection and questioning process,[4] three arguments involving testimony during the guilt phase,[5] six arguments involving prosecutorial

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[3] Arguments no. 1, 8, 25.
[4] Arguments, 2, 3, 4, 9.
[5] Arguments 5, 6, 7.

misconduct,[6] three arguments involving the sufficiency of the evidence,[7] nine arguments involving jury instruction during the guilt or penalty phases of trial,[8] five arguments involving the constitutionality of the death penalty,[9] eleven arguments alleging ineffective assistance of counsel,[10] as well as a double jeopardy argument,[11] and two arguments involving the death penalty report prepared by the trial court.[12]Document1zzB012122002128881

Before the merits of any of these claims may be addressed, several important matters must be discussed. First, the standard of review to be applied pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") must be established. *See* 28 U.S.C. § 2254(d). Second, the law relating to habeas corpus review must also be set forth. Habeas corpus review comes with an exacting set of requirements that must be satisfied *before* the federal courts will address the substance of a prisoner's claim. Claims that do not involve federal constitutional issues, that are not timely and adequately presented or preserved in the state courts, or that depend upon a "new rule" of law will not ordinarily receive habeas corpus review, absent extraordinary circumstances. Accordingly, the first duty of the Court is to discuss the standard of review and the exacting requirements of habeas corpus law. After an overview of the law, the Court will address each claim that is properly before the Court to determine whether it is subject to habeas corpus review on the merits. If so, then the Court will decide

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[6] Arguments 10, 11, 12, 18, 35, 36.
[7] Arguments 13, 24, 26.
[8] Arguments 14, 15, 16, 19, 20, 21, 22, 23, 27.
[9] Arguments 28, 29, 30, 31, 32.
[10] Arguments 33, 34, 37, 38, 39, 40, 41, 42, 43, 44, 45.
[11] Argument 17.
[12] Arguments 46, 47.

whether Petitioner is entitled to relief under clearly established precedent of the United States Supreme Court.

THE STANDARD OF HABEAS CORPUS REVIEW

Petitioner filed a notice of his intention to file a habeas corpus petition on March 7, 2000 (Dkt. No. 1). He filed his petition for a writ of habeas corpus on April 20, 2000 (Dkt. No. 13). The petition, therefore, was filed almost four years after the date that the AEDPA became effective on April 24, 1996. The provisions of the AEDPA clearly are applicable.

Under the AEDPA, a writ of habeas corpus may not be granted by a federal court to a person in custody pursuant to a state court judgment unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as defined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d).

Recently, the Supreme Court in *Williams v. Taylor,* 529 U.S. 362, 405-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) elaborated on the meaning of this statutory language. In explaining § 2254(d), the Court noted that the statute "places a new constraint on the power of the federal courts to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *Williams,* 529 U.S. at 412, 120 S. Ct. 1495. A state court decision will be "contrary to" the precedent of the Supreme Court if either the "state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law," or "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court

precedent and arrives at [the opposite] result." *Id.* at 405. 120 S. Ct. 1495.

A state court opinion will violate the "unreasonable application" clause of the statute when "the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts." *Williams,* 529 U.S. at 413, 120 S. Ct. 1495. Certain panels of the Sixth Circuit also hold that a state court opinion will be an "unreasonable application" of the Supreme Court precedent if it "either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context." *See Seymour v. Walker,* 224 F.3d 542, 549 (6th Cir. 2000), *cert. denied,* 532 U.S. 989, 121 S. Ct. 1643, 149 L. Ed. 2d 502 (2001).

The Supreme Court in *Williams* explained that "a federal court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams,* 529 U.S. at 409, 120 S. Ct. 1495. The Court explained that the term "objectively unreasonable" means that "[a] federal court may not issue the writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411, 120 S. Ct. 1495.

When determining the "clearly established federal law," the courts may look only to the decisions of the Supreme Court of the United States. *Barnes v. Elo,* 231 F.3d 1025, 1028 (6th Cir. 2000). It is error for the federal courts to rely on authority other than the Supreme Court of the United States

in their analysis under § 2254(d). *Harris v. Stovall,* 212 F.3d 940, 944 (6th Cir. 2000) (*cert. denied,* 532 U.S. 947, 121 S. Ct. 1415, 149 L. Ed. 2d 356 (2001)). Further, it is the holding of the Supreme Court decision, not its *dicta,* which is controlling in the analysis. *Id.*

The AEDPA also gives deferential treatment to the findings of fact made by a state court during the direct appeal and on state collateral review. The applicable statute provides that "[a] determination of a factual issue made by a state court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). Further, "[t]he applicant [for § 2254 relief] shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.* Accordingly, the factual findings are reversed only if Petitioner establishes that they are clearly erroneous. *Campbell v. Coyle,* 260 F.3d 531 (6th Cir., rendered August 1, 2001) (available on WestLaw at 260 F.3d at 539).

OVERVIEW OF HABEAS CORPUS LAW

In essence, the "Great Writ" exists to provide a limited opportunity for extraordinary relief when a state prisoner demonstrates that he or she is being held in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Application for a writ of habeas corpus is an original civil proceeding that exists independently of the normal channels of criminal review to test the gravest allegations that a state prisoner's detention violates the fundamental liberties safeguarded by the Constitution. *Townsend v. Sain,* 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963). The "Great Writ" is not an instrument the federal courts may employ at will to reverse a state criminal conviction. It is instead a truly extraordinary means to undo a restraint contrary to fundamental

constitutional law. *Roddy v. Black,* 516 F.2d 1380 (6th Cir.), *cert. denied,* 423 U.S. 917, 96 S. Ct. 226, 46 L. Ed. 2d 147 (1975); *Eberhardt v. Bordenkircher,* 605 F.2d 275 (6th Cir. 1979) (habeas corpus review is not a broad exercise of supervisory power, but is limited to constitutional error). The federal courts, therefore, will not use habeas corpus review to sit as an additional state appellate court. *Gemmel v. Buchkoe,* 358 F.2d 338 (6th Cir. 1966), *cert. denied,* 385 U.S. 962, 87 S. Ct. 402, 17 L. Ed. 2d 306 (1967).

A state prisoner who seeks this extraordinary relief first must fully and fairly present his or her claim, as a matter of federal law, to the state courts. *See Picard v. Connor,* 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971) (exhaustion of state remedies requires that a petitioner fairly present federal claims to the state courts so that the state may have the opportunity to correct any alleged violation of federal rights). Merely raising an issue as a matter of state law will not satisfy the exhaustion requirement. *Riggins v. McMackin,* 935 F.2d 790, 792-93 (6th Cir. 1991). A federal claim will be fairly and fully presented only if the petitioner cites to a provision of the United States Constitution, federal decisions relying upon constitutional analysis, or state decisions employing constitutional analysis in similar fact patterns, when presenting a claim to the state's highest court. *Levine v. Torvik,* 986 F.2d 1506, 1516 (6th Cir.), *cert. denied,* 509 U.S. 907, 113 S. Ct. 3001, 125 L. Ed. 2d 694 (1993). Further, the same federal claim under the same theory must be presented to the state courts before a petitioner will satisfy the exhaustion requirement. *Pillette v. Foltz,* 824 F.2d 494, 496 (6th Cir. 1987); *Franklin v. Rose,* 811 F.2d 322, 325-26 (1987).

So long as the petitioner has fully and fairly presented his federal claim to the state's highest court, the claim will be

totally exhausted even if the state courts do not consider the claim on its merits. *Harris v. Rees,* 794 F.2d 1168, 1173-74 (6th Cir. 1986). If the petitioner has not fully and fairly presented his federal claim, however, then the petition must be dismissed without prejudice for lack of exhaustion so long as a remedy remains available to pursue in the state courts and the claim is not frivolous. *Rose v. Lundy,* 455 U.S. 509, 518-20, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982); *Boggs v. Evitts,* 818 F.2d 534, 536 (6th Cir. 1987).

A different situation exists when no state remedies remain available for the petitioner to pursue and petitioner has failed to fully and fairly present his federal claim; or, the state courts have held that consideration of the claim is barred due to the petitioner's procedural default in state court. In such situations, when the petitioner has no remaining state remedy available, the petition is not dismissed for lack of exhaustion, since no remedies remain available in state court to exhaust. *Hannah v. Conley,* 49 F.3d 1193, 1195-96 (6th Cir. 1995) (*per curiam*). When this situation occurs, the federal courts ordinarily will not consider the claim unless the petitioner can show cause to excuse his failure to present the claims appropriately in the state courts, and actual prejudice as a result. *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *Teague v. Lane,* 489 U.S. 288, 298-99, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

To show cause sufficient to satisfy the cause-and-prejudice requirement, a petitioner must ordinarily establish the existence of some objective factor external to the defense that prevented counsel from complying with the state procedural rule that was violated, and which the state courts invoked to decline review of the claim. *Murray v. Carrier,* 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). If cause is shown, then the petitioner must establish prejudice that

was actual and substantial, infecting the entire trial with error of constitutional dimension. *United States v. Frady,* 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). Absent a showing of cause and prejudice, the federal courts ordinarily will not reach the merits of procedurally defaulted claims. *Reed v. Farley,* 512 U.S. 339, 114 S. Ct. 2291, 129 L. Ed. 2d 277 (1994). Only when a petitioner submits new and reliable evidence that a constitutional violation has probably resulted in the conviction of an actually innocent individual will the courts otherwise address the merits of the defaulted claim to avoid a fundamental miscarriage of justice. *Schlup v. Delo,* 513 U.S. 298, 317-23, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

Certainly, the federal courts may sometimes have difficulty in determining whether a state court has relied upon a procedural default as an adequate and independent ground to deny relief. The traditional test is to examine the last state court decision to determine whether the state court invoked a procedural bar to decline review of the petitioner's claim. *Coleman,* 501 U.S. at 729-30, 111 S. Ct. 2546. If the state decision appears to rest upon federal law, then the federal courts will presume that the state court did **not** rely on a procedural default unless so stated in the decision. *Harris v. Reed,* 489 U.S. 255, 262-63, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989). If the state court invokes the procedural bar, while discussing the merits of the claim, the federal courts will presume that the procedural default has been invoked and petitioner must show cause and prejudice to obtain review. *McBee v. Grant,* 763 F.2d 811, 813 (6th Cir. 1985). Finally, if the last state court judgment does not include an explanation for its basis, the federal courts will "look through" the last order to the preceding one. If that prior order relies on federal law, then the habeas court will presume that the state court did not rely on the default. *Ylst*

v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). If the preceding order does rely on the procedural default, the habeas court will presume that the last state court judgment likewise relied on the adequate and independent state law ground. *Id.*

Still, a final challenge remains ahead of a state prisoner who seeks to obtain habeas corpus relief in the federal courts. A prisoner who has fully and fairly presented a federal claim, which the state courts have not declined to review on its merits due to a procedural default, must still confront the retroactivity analysis of *Teague v. Lane,* 489 U.S. at 305-10, 109 S. Ct. 1060. Under *Teague,* a new rule of constitutional criminal procedure will **not** be applied retroactively to convictions that have become final before the rule was announced. *Caspari v. Bohlen,* 510 U.S. 383, 390, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994); *Graham v. Collins,* 506 U.S. 461, 466, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993). A rule will be considered "new" if it imposes new obligations on the states, breaks new ground, or was not *dictated* by existing precedent at the time the petitioner's conviction became final. *Teague,* 489 U.S. at 301, 109 S. Ct. 1060; *Gilmore v. Taylor,* 508 U.S. 333, 340, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993). A new rule will not be applied retroactively to afford relief, unless the rule places certain kinds of primary private conduct beyond the power of the criminal-lawmaking authority to prohibit; prohibits the imposition of certain types of punishment to a class of defendants due to their status or the offense; or, announces a "watershed" rule of criminal procedure that implicates the fundamental fairness and accuracy of the criminal process. *Sawyer v. Smith,* 497 U.S. 227, 241-43, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990). For the purpose of the *Teague* analysis, a conviction and sentence will be final when the availability of direct appeal in the state courts is exhausted, and the time for filing a petition

for a writ of certiorari has lapsed, or a timely petition has been finally denied. *Caspari,* 510 U.S. at 390, 114 S. Ct. 948.

The above discussion, although an overview, clearly shows the type of procedural thicket that awaits a habeas corpus petitioner. Slaughter's claims must be federal ones that have been fully and fairly presented throughout the state court proceedings. If the state courts have declined to consider such claims on their merits due to a procedural default, then he must show cause and prejudice for the default, or alternatively, that manifest injustice will result if the claim is not considered on its merits. Finally, the federal courts will not consider a claim that involves a "new rule" of constitutional criminal procedure, absent very limited circumstances. Only when all of the above conditions are satisfied will the federal courts address the merits of Slaughter's constitutional claims under the new standard of the AEDPA.

LEGAL ANALYSIS OF SLAUGHTER'S CLAIMS

Respondent has filed a motion for summary judgment (Dkt. No. 28). Petitioner has filed, in response, a motion to bar summary judgment, or in the alternative, a response to the motion (Dkt. No. 40). The gravamen of Petitioner's request to bar summary judgment is that such a procedure is inappropriate in the context of this habeas corpus proceeding.

Summary judgment motions pursuant to Rule 56 may properly be filed in habeas corpus cases. The Supreme Court has recognized the appropriateness of such motions in *Blackledge v. Allison,* 431 U.S. 63, 80, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977). The acceptance of such motions in habeas corpus cases has been expressly affirmed by the

federal courts. *See Clark v. Johnson,* 202 F.3d 760, 764-65 (5th Cir.), *cert. denied,* 531 U.S. 831, 121 S. Ct. 84, 148 L. Ed. 2d 46 (2000) ("As a general principle, Rule 56 of the Federal Rules of Civil Procedure, applies with equal force in the context of habeas corpus cases.") (citing Rule 11 of the Rules Governing § 2254 Cases; Fed. R. Civ. P. 81(a)(2)); *Randle v. Scott,* 43 F.3d 221 (5th Cir. 1995), *cert. denied,* 515 U.S. 1108, 115 S. Ct. 2259, 132 L. Ed. 2d 265 (1995) ("We recognize summary judgment proceedings as an appropriate mode used by the district courts of this Circuit in habeas corpus proceedings."). Our own Circuit has reviewed habeas corpus cases disposed of on motion for summary judgment. *See Sanders v. Freeman,* 221 F.3d 846 (6th Cir.), *cert. denied,* 531 U.S. 1014, 121 S. Ct. 571, 148 L. Ed. 2d 489 (2000); *Workman v. Bell*, 178 F.3d 759 (6th Cir. 1998), *cert. denied,* 528 U.S. 913, 120 S. Ct. 264, 145 L. Ed. 2d 221 (1999). Accordingly, no prohibition exists against the use of motions for summary judgment merely because of the nature of the proceeding as being a habeas corpus proceeding. The only question is whether the requirements for a grant of summary judgment have been satisfied.

Summary judgment will be proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). *See Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In reviewing a motion for summary judgment, the court is required to view the evidence and draw all inferences in the favor of the non-moving party. *Id.* The court should not weigh the evidence and determine the truth of the matter, but

is to determine only whether there is a genuine issue for trial. *Id.* The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Anderson,* 477 U.S. at 247-48, 106 S. Ct. 2505; *Talley v. Bravo Pitino Restaurant, Ltd.,* 61 F.3d 1241, 1245 (6th Cir. 1995). Only disputes over facts that may affect the outcome of the suit under governing law will prevent the entry of a summary judgment. *Anderson,* 477 U.S. at 248, 106 S. Ct. 2505; *Nernberg v. Pearce,* 35 F.3d 247, 249 (6th Cir. 1994). Factual disputes that are irrelevant or unnecessary will not do so. *Id.* If the facts of a case are undisputed, then one of the parties will be entitled to judgment as a matter of law. *Atlantic Richfield Co. v. Monarch Leasing Co.,* 84 F.3d 204, 206 (6th Cir. 1996). Indeed, the appellate court may even direct entry of summary judgment when a case on review presents no genuine issue of material fact and proper disposition is clear under the controlling law. *Nazay v. Miller,* 949 F.2d 1323, 1328 (3d Cir. 1991). *See also Teague v. Scott,* 60 F.3d 1167, 1170 (5th Cir. 1995) (in reviewing a grant of summary judgment in a habeas case where there are no state court findings on a specific issue, the appellate court will review the grant of summary judgment *de novo* employing the traditional standard for summary judgment to grant summary judgment only when there is no dispute as to the material facts).

PRETRIAL CLAIMS

Three of Petitioner's claims are considered in this section. These claims include Petitioner's claim that he was denied due process by the failure of the trial court to conduct an evidentiary pretrial hearing on his competency to stand trial (Memorandum of Law in Support of Habeas Petition ("Memo"), pp. 58-62); his claim that the trial court denied

him due process by failing to hold a pretrial hearing on the existence of aggravating factors (Memo, 159-161); and his claim that the seizure of various body samples from him was a violation of the Fourth and Fourteenth Amendments (Memo, 78-79). The Court will address each of these arguments in the order in which it appears in Petitioner's Memo.

Competency Hearing

Prior to Petitioner's trial, his attorney requested a psychiatric examination pursuant to RCr 8.06, "to determine both ... sanity and competency to stand trial." (Transcript of Record ("TR"), Vol. I, p. 27). Attached to the motion was counsel's brief affidavit (*Id.*, 28). The affidavit stated, in relevant part, that counsel "believes the defendant is not competent to stand trial due to his lack of his understanding of the seriousness of the crime, and his inability to comprehend the judicial repercussions should he be found guilty." (*Id.*).

The trial court entered an Order on March 21, 1983, that directed Petitioner to be admitted to the Kentucky Correctional Psychiatric Center ("KCPC") for examination and psychiatric evaluation (TR I, 29). Petitioner was transferred to KCPC where he was evaluated by a licensed psychologist, Philip W. Johnson, Ph.D. (Appendix, Vol.I, pp. A80-85).

Based on his examination, Dr. Johnson found Petitioner to be operating in the low-normal level of intellectual functioning (Appendix, Vol.I, A84). Dr. Johnson found that Slaughter's psychological condition did not prohibit him from actively and constructively participating in the legal process. *Id.* In support of this conclusion, the doctor found no deficits in Petitioner's ability to: appraise legal defenses, manage

behavior, plan a legal strategy, appraise the role of various individuals in the judicial process, understand courtroom procedure, appreciate the nature of the charges and penalties, disclose pertinent facts to his attorney, realistically challenge prosecution witnesses and testify relevantly. (*Id.*, A84-85). Based on the doctor's report, Petitioner's attorney appeared in open court on October 5, 1983, and withdrewhis prior motion for a competency hearing (TR I, 61).

Petitioner raised the competency issue on direct appeal. His argument may be found at pages 68 through 72 of his brief to the Supreme Court of Kentucky in *Slaughter v. Commonwealth,* Appeal No. 84-SC-272-MR. In his brief, Petitioner raised the competency hearing issue as a matter of federal law, arguing that an evidentiary pretrial hearing was constitutionally required as a matter of due process under *Pate v. Robinson,* 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966) and *Dusky v. United States,* 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

The Opinion of the Kentucky Supreme Court in *Slaughter v. Commonwealth,* 744 S.W.2d 407 (Ky. 1988), *cert. denied,* 490 U.S. 1113, 109 S. Ct. 3174, 104 L. Ed. 2d 1036 (1989) does not speak directly to the competency issue, but includes it by general reference to other issues that are "without merit." *Slaughter,* 744 S.W.2d at 409. Because the Supreme Court of Kentucky did not discuss this issue, and cites to no controlling Supreme Court precedent, the Court cannot determine, based only on the limited language of the Opinion, whether the decision was contrary to clearly established precedent of the Supreme Court, or was an unreasonable application of such precedent. The State Supreme Court did characterize the issues as being "without merit." Accordingly, the Court does presume that it was considered and rejected on its merits. The Court, therefore,

considers the question to be whether the decision of the Supreme Court of Kentucky to deny relief on this issue was contrary to clearly established precedent of the Supreme Court, or if not directly contrary, whether it would be an unreasonable application of such precedent.

Petitioner has cited the controlling precedent of the Supreme Court which was in existence at the time that his conviction became final upon direct appeal, when the United States Supreme Court denied his motion for certiorari in 1988. Review of *Pate, Dusky,* and *Drope v. Missouri,* 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) reveals that the decision of the Kentucky Supreme Court was not contrary to nor an unreasonable application of any of the three decisions. Petitioner was not constitutionally entitled to a pretrial competency hearing based upon the report of Dr. Johnson, the affidavit of his trial attorney or any other facts of record at the time his trial was held. Unlike defendant Robinson in the *Pate* decision, the present Petitioner had no lengthy history of "pronounced irrational behavior" such as would put the court on notice that his competency to stand trial was in doubt. *Pate v. Robinson,* 383 U.S. at 386, 86 S. Ct. 836. In fact, the facts of *Pate* stand in stark contrast to the facts of this case. Robinson had a long history of paranoid, delusional behavior that include psychiatric hospitalization, suicide attempts and bizarre, irrational behavior. *Id.*

The same is true of the defendant in the *Drope* decision. Drope was noted to have led a "marginal existence" with a "history of anti-social conduct" and "strange behavior" noted by his wife. *Drope,* 420 U.S. at 165, 95 S. Ct. 896 n1. Drope also had a history of suicidal behavior. *Id.,* at 169, 95 S. Ct. 2040. Accordingly, in both *Drope* and *Pate,* the trial courts had more than sufficient information to raise grave doubts concerning the defendant's ability to comprehend the

nature of the charges and actively participate in his defense.

Such facts are not present here. Petitioner had no documented history of psychiatric hospitalization, suicidal behavior, delusions or other aberrant behaviors. (App.I, A 80). Dr. Johnson found in his report that Petitioner "exhibited no symptomatology consistent with a thought disorder or effective disorder of psychotic proportion. No delusional ideation or hallucinatory behavior were observed in, or reported by, the patient." (*Id.*, A-38). Dr. Johnson also found that Petitioner was competent to understand the nature of the charges and assist in all aspects of his defense.

Dr. Engum, one of the experts for Petitioner during the RCr 11.42 hearing, testified that Petitioner has "always been extremely calm, extremely bright." (VHR I, 9/7/94, 13:43:30). Dr. Engum found Slaughter to be in the average range of intellectual functioning. (*Id.*, 13:43:51). His full skill IQ was determined to be 107, "which is truly remarkable." (*Id.*, 13:44:02-44:25). Like Dr. Johnson, Dr. Engum found Slaughter to be competent (*Id.*, 13:46:28).

No mental health professional has ever determined that Petitioner was incompetent. At most, he was diagnosed with attention deficit disorder accompanied by difficulties in acquiring new information. (VHR I, 9/7/94,13:35:00). The trial court simply had no information before it that would have called into question Petitioner's competency. The pretrial affidavit filed by his attorney was merely a three-paragraph "boiler plate" affidavit with no specific facts whatsoever. Contrary to the affidavit, Petitioner was able to participate in his defense and testified during the penalty phase of the trial in a responsive fashion. His few, unrestrained comments during the trial were made in response to adverse testimony from prosecution witnesses

and merely indicated that he was aware of the damaging nature of such testimony, rather than suggesting, even remotely, the prospect of incompetency.

In sum, the Supreme Court of Kentucky properly declined to grant Petitioner relief upon this issue, and its decision to do so was not contrary to, nor an unreasonable application of, any clearly established precedent of the United States Supreme Court at the time. This is so because there were simply no facts in the record which would have caused the trial court to have a serious question about the competency of Petitioner.

Seizure of Body Samples

The second pretrial issue involves a question concerning the seizure of certain body samples from Petitioner following his arrest. Petitioner was arrested on February 21, 1983 (TE V, 617). Several days later, he was taken to Humana Hospital University where samples of his hair, blood and saliva were taken (TE III, 413). Petitioner claims that no warrant authorized such seizures, nor were such warrantless seizures justified by exigent circumstances. Accordingly, he maintains that the seizure of these items, and their introduction into evidence at trial, violated his Fourth and Fourteenth Amendment rights. In support of this argument, he relies on *Schmerber v. California,* 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

Petitioner did raise this issue on direct appeal to the Supreme Court of Kentucky (Brief for Appellant, 79-82). The Supreme Court of Kentucky did not consider the issue separately, but merely found it to be "without merit." *Slaughter,* 744 S.W.2d at 409.

Here, the Court need not attempt to determine whether the decision of the Supreme Court of Kentucky was contrary to, or an unreasonable application of, controlling Supreme Court precedent. Such an analytical exercise is not required, because Petitioner may not seek habeas corpus relief on this claim, given *Stone v. Powell,* 428 U.S. 465, 494-495, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). The *Stone* decision holds that the federal courts will not consider a claim of illegal search and seizure if the state prisoner seeking § 2254 relief had a full and fair opportunity to raise such claim in the state courts. *Id.; Gilbert v. Parke,* 763 F.2d 821, 823-24 (6th Cir. 1985). This rule applies even in the context of those habeas corpus petitions involving death-penalty convictions. *See McQueen v. Scroggy,* 99 F.3d 1302, 1332 (6th Cir. 1996), *cert. denied,* 520 U.S. 1257, 117 S. Ct. 2422, 138 L. Ed. 2d 185 (1997). So long as the state has provided, in the abstract, a mechanism by which Petitioner could have raised this claim, a full and fair opportunity to raise the claim exists. *Gilbert,* 763 F.2d at 823.

Petitioner does not claim that he was denied a full and fair opportunity to raise this claim. Had he chosen, he could have filed a pretrial motion to suppress. He did not, and now, may not revive this issue contrary to *Stone v. Powell.*

Hearing on Aggravating Factors

Petitioner claims in his third argument on pretrial matters that he was denied due process when the trial court failed to hold a pretrial hearing on the existence of aggravating factors sufficient to support a capital charge. On July 25, 1983, the Commonwealth filed written notice of its intent to proceed with a capital charge. (TR I, 48). The notice provided that the Commonwealth would proceed with the indictment as a capital murder based on the "pertinent aggravating factor

being that the murder was committed during the commission of a robbery in the first degree pursuant to KRS 515.020." (*Id.*) In response to this notice, Petitioner's attorney filed a request for a pretrial hearing "to review the merits of the Commonwealth's claim as to the existence of *any* aggravating factor which would merit capital punishment herein." (TR I, 50). The motion added that the defense had yet to receive the minutes of the grand jury proceedings, and the hearing was intended to be a "pragmatic approach to the longer protractive method of litigation which the denial of [sic] hearing would necessitate." (*Id.*) The request for a hearing was overruled *sub silentio,* and no hearing was held.

Petitioner raised this issue on direct appeal to the Supreme Court of Kentucky. The argument may be found at pages 82 through 85 of his brief on direct appeal. (Brief for Appellant, Appeal No. 84-SC-272-MR, 82-85). The Supreme Court of Kentucky did not specifically address this argument. As with the two earlier-mentioned arguments, the State Supreme Court simply held that it was one of the twenty-nine arguments raised on direct appeal that was "without merit." Petitioner now maintains that the decision of the State Supreme Court was contrary to, or an unreasonable application of, *Gregg v. Georgia,* 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

The argument of Petitioner is essentially based on the claim that the prosecution failed to produce sufficient evidence at trial that the murder of the store owner occurred during the course of a robbery. Robbery was the only aggravating factor alleged in the notice of the Commonwealth. Petitioner claims that had the trial court held a pretrial hearing, it would have discovered prior to trial that the aggravating factor of robbery was unsupported by the evidence. Accordingly, Petitioner concludes that "both fundamental fairness and

judicial economy would have been served had the court ruled that aggravating factor insufficient prior to trial."

The problem with Petitioner's argument is that nowhere in *Gregg* is there held to be a constitutional requirement that the existence of an aggravating factor must be determined prior to trial by way of a pretrial hearing. The *Gregg* decision concerns itself primarily with the constitutionality of the death penalty and the adequacy of the capital punishment scheme under the Georgia statutory system. *Gregg,* 428 U.S. at 196-207, 96 S. Ct. 2909.

As Respondent correctly points out, the Supreme Court has subsequently held in *Lewis v. Jeffers,* 497 U.S. 764, 782-784, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990) that the adequacy of the proof of an aggravating circumstance is to be determined under the standard of *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), with "a sentencer to 'resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *Id.,* 782, 110 S. Ct. 3092. A state court's finding of an aggravating circumstance in a particular case will be deemed arbitrary and capricious if and only if no reasonable sentencer could have so concluded. *Id.,* 783, 110 S. Ct. 3092. Accordingly, the Supreme Court has indicated in *Lewis* that the finder of fact is to determine the existence or non-existence of an aggravating circumstance during the penalty phase of a capital trial. There is no constitutional requirement that the existence of an aggravating factor be determined prior to the start of trial. Accordingly, the Supreme Court of Kentucky did not act contrary to, or unreasonably apply, clearly established Supreme Court precedent, in rejecting this argument without extended

discussion.[13]

JURY SELECTION AND QUESTIONING

Petitioner raises three arguments that involve selection and questioning of the jury. The first argument involves the failure of the trial court to excuse juror Graf for cause (Memorandum of Law in Support of Petition, 62-67). The second argument relates to Petitioner's claims that the trial court erred when it excluded prospective jurors whose views on the death penalty allegedly would not have prevented or impaired them from performing their duty as jurors. (*Id.*, 67-71). Finally, Petitioner argues that he was denied a jury representing a fair cross-section of the community, and due process of law, when the trial court excluded for cause those jurors who were not "death-qualified." (*Id.*, 72-73). The Court again shall address these arguments in the order in which they are presented.

Juror Graf

During the voir dire, Petitioner's attorney challenged Juror Graf for cause. (TR I, 101). Graf volunteered during voir dire that she had previously, on two occasions, been the victim of a break-in robbery at her home. (TE I, 98-99). In her words, "my home was robbed twice, and I saw the party and I don't think I could be very impartial ..." (*Id.*, 99). Graf went on to add, after the prosecutor explained the circumstances of the case, that she "was badly frightened by the one that broke in, that's why I wanted to know. I know I

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[13] The court will separately consider Petitioner's related argument that the evidence offered at trial was insufficient to establish the existence of robbery as an aggravating factor.

couldn't be impartial on that. On this I assume I probably wouldn't have any ..." (TE I, 100). At that point, defense counsel interrupted. However, when she was asked concerning the difference between the two crimes, Graf made the following statement, "Well, I was frightened so badly because I found them in my home and I just-I just wouldn't want to be involved in anything like that. But the break-in, I could make that general and I could probably be impartial." (TE I, 101). Based on her response, the trial court declined to strike Juror Graf for cause from the jury. Instead, Petitioner exercised a peremptory challenge to remove Graf prior to trial.

On appeal, Petitioner argued that the trial court had denied his Sixth and Fourteenth Amendment rights by refusing to excuse Juror Graf for cause. The argument may be found on pages 31 through 36 of his brief on appeal in *Slaughter v. Commonwealth,* Appeal No. 84-SC-272-MR. The Supreme Court of Kentucky did address this argument specifically on its merits. *Slaughter,* 744 S.W.2d at 411. The State Supreme Court held that the trial court did not abuse its discretion in refusing to remove Graf for cause. According to the court, her subsequent answers rehabilitated her to the extent that the trial court properly exercised its discretion in declining to strike her from the jury for cause. *Id.*

Petitioner maintains that the decision of the Kentucky Supreme Court is contrary to, or an unreasonable application of, the decision announced in *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). In essence, he claims that, contrary to *Irvin,* the state court permitted mere form to rule over substance and relied upon a talismanic approach to the question of impartiality that ignored the fact that the juror had twice been the victim of a similar crime, had expressed an emotional response and had equivocated

that she could only "probably" be impartial. (Brief, 64-65).

The decision of the Kentucky Supreme Court was not contrary to, nor an unreasonable application of, *Irvin* or any other precedent of the Supreme Court on this question. The Supreme Court held in *Ross v. Oklahoma,* 487 U.S. 81, 88, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988) that a defendant's right to challenge for failure to remove a juror for cause is dependent upon whether the juror actually sat on the jury, and if petitioner properly preserved his claim. Subsequently, in *United States v. Martinez-Salazar,* 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792, the Supreme Court held that when a defendant objects to a trial court's denial of a for-cause challenge to a potential juror, the defendant may choose either to remove the challenged juror peremptorily and forgo a later Sixth Amendment challenge, or to allow the juror to sit, thereby preserving the Sixth Amendment claim for appeal. *Id.*

Here, Petitioner's attorney chose to exercise a peremptory challenge to remove Graf from the jury. She did not sit on his jury and was not a member of the panel that convicted him and subsequently fixed a punishment of death. Accordingly, Petitioner has no Sixth Amendment challenge based on the failure of the trial court to remove Graf for cause. *See, Wolfe v. Brigano,* 232 F.3d 499, 501-503 (6th Cir. 2000) (discussing *Ross* and *Martinez-Salazar* in a decision that ~~granted~~ habeas corpus relief on this issue).

Jurors Abrams and Douglas

Petitioner maintains in his second jury argument that the trial court improperly excluded for cause two jurors, Mary Abrams and Juanita Douglas, based on their opposition to the death penalty. (TE I, 68-71; 131-132). Petitioner argues

that the comments of Abrams and Douglas were not of such nature to demonstrate that their views would "prevent or substantially impair the performance of [their] ... duties as a juror in accordance with [the] ... instructions and ... oath." *See Wainwright v. Witt,* 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

In raising this argument, Petitioner relies upon *Wainwright,* along with *Gray v. Mississippi,* 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987); *Adams v. Texas,* 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980); *Jaggers v. Kentucky,* 403 U.S. 946, 91 S. Ct. 2282, 29 L. Ed. 2d 856 (1971); and *Witherspoon v. Illinois,* 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed .2d 776 (1968). Petitioner properly raised the argument in his brief on direct appeal to the Supreme Court of Kentucky at pages 101 through 104. The Supreme Court of Kentucky did not specifically address the argument, but merely included it among those of the twenty-nine arguments that were "without merit."

During individual voir dire, Juror Abrams advised that she had conscientious scruples against imposing the death penalty. The prosecutor then asked her whether she could return a verdict of death in this or any other case regardless of the facts. (TE I, 132). Abrams reiterated that, "I do not believe in the death penalty." (*Id.*) The court then excused Abrams for cause. (*Id.*)

In *Adams v. Texas,* 448 U.S. 38, 43-45, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980) the Supreme Court applied the standard of *Witherspoon* in the context of a bifurcated trial in a capital case. *Id.* The Court held that the *Witherspoon* line of cases established the general proposition that a juror may not be challenged for cause based upon his or her views about capital punishment unless those views would prevent or

substantially impair the performance of the juror's duties as a juror in accordance with his or her instructions and oath. *Adams,* 448 U.S. at 45, 100 S. Ct. 2521. Five years later, in 1985, the Supreme Court reiterated the *Adams* holding in *Wainwright v. Witt,* 469 U.S. 412, 418-426, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985). To quote from *Wainwright:*

> We therefore take this opportunity to clarify our decision in *Witherspoon,* and to reaffirm the above-quoted standard from *Adams* as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that, in addition to dispensing with *Witherspoon's* reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is so because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.

Id., at 424, 105 S. Ct. 844. The Court then concluded that when the trial judge is left with the definite impression that a prospective juror would be unable to apply faithfully and impartially the law, the prospective juror may be excluded for cause and "deference must be paid to the trial judge who sees and hears the juror." *Id.,* at 426, 105 S. Ct. 844.

Here, the Supreme Court of Kentucky was not contrary to, nor unreasonable in, its decision to deny relief as to the exclusion of Juror Abrams. Abrams was steadfast in her view that she did not believe in the death penalty. The trial judge had the opportunity, which obviously this court does

not have, to observe her demeanor and determined that her views would substantially impair her performance as a juror. The federal courts must show substantial deference to such factual determinations. *See* 28 U.S.C. § 2254(e).

The same conclusion applies with equal force to prospective Juror Douglas. Her responses also reveal that she would have been substantially impaired in her ability to perform her duties as a juror in a capital case. Douglas expressed conscientious scruples against the death penalty. (TE I, 68-71). She candidly acknowledged that due to those scruples, she did not know if she could vote for the death penalty under any circumstances, adding, "I am religiously against the death penalty." Based on her comments, the trial court excluded Douglas without objection by defense counsel. Again, substantial deference must be afforded the decision of the trial court. Based upon the record, the Supreme Court of Kentucky did not act contrary to clearly established precedent of the United States Supreme Court, nor unreasonably apply such precedent, in refusing to grant relief given the standard of *Adams* as applied in *Wainwright.*

Death-Qualified Jury

Petitioner argues next that the exclusion of those jurors who were not "death-qualified" violated his rights to a representative, impartial jury from a cross-section of the community. (Brief, 54-55). He maintains that the use of a "death-qualified" jury resulted in a jury that was biased in favor of imposing the death penalty. While Petitioner acknowledges that the United States Supreme Court rejected a similar argument in *Witherspoon v. Illinois,* 391 U.S. 510, 517-518, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), this decision, according to Petitioner, was due to the inadequacy of the factual basis set forth in that particular case. Petitioner

maintains that certain, undescribed "current scientific research" now establishes that such death-qualified juries are conviction-prone and tend to give harsher sentences.

Petitioner's attorney did not raise this issue by objection at trial. Petitioner did present the argument in his Brief on direct appeal at pages 104 through 107. The Supreme Court of Kentucky, in keeping with its treatment of the earlier arguments, did not separately address this claim, but instead simply chose to dismiss it generally as one of the claims "without merit."

This resolution was not contrary to, nor an unreasonable application of, the controlling Supreme Court precedent. Petitioner candidly acknowledges that the *Witherspoon* decision is contrary to his position on this issue. (Brief, 73). Further, in *Lockhart v. McCree,* 476 U.S. 162, 173-183, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986), the Supreme Court of the United States once again held that the Constitution does not prohibit the removal for cause of prospective jurors whose opposition to the death penalty is so strong that it will prevent or substantially impair the performance of their duties as jurors at the sentencing phase of a capital trial. *Id.* The Court reached this same conclusion even though social science studies introduced in the lower courts were adequate to establish that death-qualified juries tended to be somewhat more conviction-prone than non-death-qualified juries. *Id.*

Thus, the Supreme Court has twice rejected the argument of Petitioner on this issue. On the second occasion, the Supreme Court rejected Petitioner's argument regardless of more recent social science studies. The Kentucky Supreme Court decision, therefore, was not contrary to, nor an unreasonable application of, any controlling precedent of the federal Supreme Court.

TESTIMONY-RELATED ISSUES

The next portion of this memorandum addresses those arguments of Petitioner that relate to constitutional issues based on the nature, or the adequacy, of the testimony at trial. These testimony-related issues may be found at arguments five through seven. Claims that relate to the adequacy of the trial testimony may be found at arguments XIII, XXIV and XVI. The final two arguments considered in this section involve the alleged use of perjured testimony and the destruction of the taped statement of jailhouse informant Keller (Arguments XXXV and XXXVI). Again, the arguments are discussed in the order in which they are raised.

Testimony of Officer Pike

Arguments V and VI of Petitioner's memorandum center upon the trial testimony of Officer Pike. On cross-examination by Petitioner's attorney, Officer Pike was asked what made him think, when he took Slaughter into the bedroom of the apartment on January 29, that Slaughter was going to talk to him. (TE V, 720). Officer Pike responded as follows:

> A. Because I knew at that time that as a police officer our suspicions as long as I have been on it he had something to do with this case, and I took him in there to see if he would tell me, you know, what was going on, who was involved with him or what have you, which he didn't. I thought he might, but he didn't.

(*Id.*) Petitioner maintains that this comment was "totally impermissible" and, in essence, advised the jury that

Petitioner was guilty in Officer Pike's view. Petitioner maintains that he was denied his Fourteenth Amendment right to a fair trial by this testimony.

This issue was raised on direct appeal by Petitioner at pages 49 through 52 of his Brief in *Slaughter v. Commonwealth,* Appeal No. 84-SC-272-MR. The Supreme Court of Kentucky, once again, merely characterized this issue as being without merit.

In this Court, Petitioner relies upon *Berger v. United States,* 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935), as being the precedent of the Supreme Court that was unreasonably applied by the state courts in rejecting him relief on this issue. Petitioner's reliance upon the *Berger* decision is somewhat curious. He did not cite the decision at any time in the state courts in support of this issue. More importantly, the *Berger* decision, while frequently cited, runs to two separate issues that do not relate to the current argument.

The first issue that *Berger* addresses is the question of materiality in a variance between the proof at trial and the charges of an indictment. *Berger,* 295 U.S. at 81-82, 55 S. Ct. 629. The second issue that *Berger* resolves is prosecutorial misconduct in cross-examination. *Id.,* at 84-88, 55 S. Ct. 629. This second issue led to the now-famous quotation concerning the United States Attorney being a representative, not of an ordinary party, but of a sovereignty, whose obligation in a criminal prosecution "is not that it shall win a case, but that justice shall be done." *Id.,* at 88, 55 S. Ct. 629.

While this quotation has found its way into many a legal brief in both state and federal courts, it has little to do with the question of improper opinion testimony by a lay witness

in a criminal trial. Accordingly, the Court would be well within its bounds in stopping its analysis at this point, in simply concluding that Petitioner had failed to show the unreasonable application of the single United States Supreme Court precedent that he cited.

The actual precedent of the Supreme Court that applies on the question of admissibility of evidence in a state trial is more appropriately found in *Estelle v. McGuire,* 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991), which relies on the decisions of *Lewis v. Jeffers,* 497 U.S. 764, 780, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990), and *Pulley v. Harris,* 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). In *Estelle,* the United States Supreme Court ruled that the defendant's due process rights were not violated by the admission of evidence in a state criminal trial as "federal habeas corpus relief does not lie for errors of state law." *Id.,* at 67, 112 S. Ct. 475. The Court held "[t]oday, we re-emphasize that it is not the province of the federal courts to re-examine state-court determination on state-law questions." Accordingly, an issue involving the admissibility of evidence will not raise a question of federal constitutional magnitude unless the alleged error was so egregious that Petitioner was denied a fundamentally fair state trial as a result. *See Romano v. Oklahoma,* 512 U.S. 1, 11-12, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994) (discussing the admission of evidence during the penalty phase of a capital state trial).

In deciding whether the admission of evidence denied a state defendant his or her fundamental right to due process, the Court will consider whether the evidence was critical to the case and whether it tended to exculpate the accused. *See Chambers v.Mississippi,* 410 U.S. 284, 297-302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). *See Clemmons v. Sowders,* 34 F.3d 352, 357-358 (6th Cir. 1994); *Kelly v. Withrow,* 25

F.3d 363, 370 (6th Cir.), *cert. denied,* 513 U.S. 1061, 115 S. Ct. 674, 130 L. Ed. 2d 607 (1994); *Cooper v. Sowders,* 837 F.2d 284, 286 (6th Cir. 1988).

Here, the Supreme Court of Kentucky reasonably concluded, albeit implicitly, that Petitioner was not denied a fundamentally fair trial by Officer Pike's brief comment that Petitioner "had something to do with this case." It must be remembered that Officer Pike came to the apartment based on information provided by Keith Edwards that Slaughter had confessed to robbing and murdering Esther Stewart (TE V, 646). When Pike arrived at the apartment, Slaughter advised the officers that he was suspected of being the murderer by Keith and Laura Edwards (TE V, 649). Thus, it was hardly surprising that Pike concluded that Slaughter had something to do with the case.

Further, Officer Pike's general comment was so vague and non-specific that it could hardly have had a substantially and injurious effect on the verdict of the jury. Many witnesses testified during the trial concerning Slaughter's admissions about his involvement in the robbery/murder. (TE III, 320; IV, 516, 538, 549; V, 619; 649). The jury, therefore, had ample unobjectionable evidence before it, sometimes in graphic terms, that Slaughter did indeed have "something to do with this case." (TE VIII, 1032, 1088, 1140, 1145, 1178-1179). Officer Pike's fleeting reference to his personal suspicion was unlikely to have had any impact upon the jury, much less an impact so substantial and injurious as to render the trial fundamentally unfair.

In his second argument involving Officer Pike's testimony, Petitioner maintains that Officer Pike improperly commented on his post-arrest silence in violation of *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) and

Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). Specifically, Petitioner refers to the following testimony:

> A. And Officer Clabfleish advised him of his rights at that time. I took Mr. Slaughter in one of the back bedrooms and talked with him and was trying to get him to tell me who was with him, if there was a white person involved with him and ...
>
> Q. Did he tell you?
>
> A. He did not give me-I thought he was going to tell me something, but he didn't. He didn't give me no names, no nothing. So about that it wasn't-we wasn't there but just a minute or so.

(TE V, 712). Again, on cross-examination, Officer Pike testified:

> A . . . I took him in there to see he would tell me, you know, what was going on or who was involved with him or what have you, which he didn't. I thought he might but he didn't

(TE V, 720).

Petitioner did not raise this issue in the trial court but did raise the issue on direct appeal at pages 52 and 53 of his brief to the Supreme Court of Kentucky in *Slaughter v. Commonwealth,* Appeal No. 84-SC-272-MR. The Supreme Court of Kentucky did not specifically address this claim, but in keeping with its practice, simply made a passing reference to claims "without merit." *Slaughter,* 744 S.W.2d at 409.

In *Doyle,* two criminal defendants testified at trial, making exculpatory statements that they had not offered previously following their arrest. Over objection, the prosecutor cross-examined each defendant about why he had not so advised the arresting officers if the exculpatory statements were true. The defendants had exercised their right to silence and had not made any post-arrest statements to the officers. Based on those facts, the Supreme Court held that total silence in the face of *Miranda* warnings is completely ambiguous and may be nothing more than the exercise of one's *Miranda* rights. *Doyle,* 426 U.S. at 617, 96 S. Ct. 2240. The court then continued to hold that the use of such post-arrest silence in cross-examination violated due process because it was contrary to the implicit assurance that *Miranda* warnings would not be used against an arrestee. *Id.,* at 618, 96 S. Ct. 2240.

When, however, a defendant chooses to speak after receiving *Miranda* warnings an entirely different situation occurs. In such situations, the controlling precedent of the Supreme Court is *Anderson v. Charles,* 447 U.S. 404, 100 S. Ct. 2180, 65 L. Ed. 2d 222 (1980). When a defendant does choose to offer a statement following arrest and *Miranda* warnings, he has not been induced to remain silent. Accordingly, testimony concerning his post-arrest conduct and statements is not a violation of *Doyle. See United States v. Crowder,* 719 F.2d 166, 171-172 (6th Cir. 1983), *cert. denied,* 466 U.S. 974, 104 S. Ct. 2352, 80 L. Ed. 2d 825 (1984); *Hockenbury v. Sowders,* 718 F.2d 155, 156-159 (6th Cir. 1984), *cert. denied,* 466 U.S. 975, 104 S. Ct. 2354, 80 L. Ed. 2d 826 (1984) (discussing *Anderson* in the context of habeas corpus proceedings).

Here, the facts are those of the *Anderson* scenario. Petitioner did not choose to remain silent in the face of his *Miranda*

warnings. To the contrary, Petitioner made repeated, often contradictory, statements to at least three police officers following his arrest. Given his repeated post-arrest statements, the holding of *Doyle* has little impact in this case. Rather, it is *Anderson* that controls and convinces the Court that the Supreme Court of Kentucky was not acting contrary to, nor making an unreasonable application of, controlling Supreme Court precedent when it denied Petitioner relief on this question. Petitioner chose to make a host of post-arrest statements, and his silence was not impermissibly used against him at trial in violation of *Doyle*.

Uncharged Misconduct

Petitioner next argues that the admission of evidence concerning uncharged crimes denied him a fundamentally fair trial. During his trial, on repeated occasions, witnesses testified concerning various theft-related crimes that Petitioner had earlier committed. This testimony was elicited both by the prosecutor and by defense counsel (TE II, 281; V, 654; VIII, 1131, 1202, 1208; IX, 1256, 1279, 1299-1300). Admission of such evidence resulted in Petitioner's attorney unsuccessfully moving for a mistrial (TE IV, 489-492; VIII, 1052-1053, 1099).

On direct appeal, Petitioner raised this issue at pages 53-59 of his Brief in *Slaughter v. Commonwealth,* Appeal No. 84SC272-MR. The Supreme Court of Kentucky, as before, merely made a general reference to this issue as being "without merit." *Slaughter,* 744 S.W.2d at 409.

Petitioner again relies only on the decision of *Berger v. United States,* 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935) as the controlling precedent of the United States Supreme Court that supposedly was not reasonably applied

by the state courts. The Court already has discussed the inapplicability of the *Berger* decision on a question concerning the admissibility of evidence in a state trial. Once again, the more appropriate authority is that discussed in the *Estelle* decision, which holds that the admission of evidence in a state criminal trial ordinarily does not raise a federal constitutional question, unless the improper admission of evidence was so egregious, and had such a substantial and injurious effect, as to render the trial proceedings fundamentally unfair.

Petitioner's trial simply was not rendered unfair by the repeated testimony concerning his prior acts of thievery. Indeed, the focus of the defense during the guilt phase was to portray to the jury the Petitioner as being merely a thief, not a murderer. It must be remembered that Petitioner's attorney had anticipated that Petitioner would testify at trial and was well aware that Petitioner had a prior felony conviction involving theft.[14] Accordingly, the strategy of defense counsel from the outset of the guilt phase of trial was to acknowledge Petitioner's prior criminal history but to use the non-violent nature of that criminal history in an attempt to show the jury that Petitioner was simply not the type of criminal who was a killer.

For example, in opening statement, Petitioner's attorney told the jury, "[t]he evidence will show you-Mr. Slaughter will admit to you he's got a prior conviction. He is a thief. A

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[14] In fact, Petitioner had a prior felony conviction for theft by unlawful taking, which had resulted in a 5-year sentence. *Commonwealth v. Slaughter,* Case No. 82-CR-1635 (Jefferson Circuit Court 1983). In addition, he had a series of theft charges that were disposed of in the Jefferson District Court as misdemeanor offenses in 1981 and 1982 (*see* App., Vol. I, pp. 42-44).

thief is not a robber, nor is it a murderer." (TE II, 281). In his taped statement to the police, Petitioner made repeated references to other theft-related crimes that he had previously committed (TE IV, 549). In closing argument, his attorney again acknowledged that Petitioner "makes his living stealing," (TE IX, 1256), and re-emphasized, "James Slaughter is a thief." (*Id.*, 1279). Accordingly, the fact that other witnesses during the trial made brief references to certain uncharged thefts could hardly have rendered the trial fundamentally unfair. Indeed, their testimony simply played into the defense strategy to portray Petitioner as being a frequent criminal, but a decidedly non-violent one. The decision of the Supreme Court of Kentucky to deny Petitioner relief on this argument was not contrary to, nor an unreasonable application of, any clearly established precedent of the United States Supreme Court.

Insufficiency of the Evidence

Petitioner maintains in argument XIII that he was deprived of due process in violation of the Fourteenth Amendment because his conviction for first-degree robbery was not supported by any evidence other than his out-of-court confession (Memo., 95-99). He claims that the prosecution could not rely solely on his confession to prove robbery, given the requirement under Kentucky Criminal Rule, RCr 9.60, that "a confession of defendant, unless made in open court, will not warrant a conviction unless accompanied by other proof that such an offense was committed." In support of this argument, he cites *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Petitioner did move for a directed verdict of acquittal during his trial (TE IX, 1215-1218, 1241-1242). He also raises this issue on direct appeal to the Supreme Court of Kentucky at

pages 24-43 of his Brief in *Slaughter v. Commonwealth,* Appeal No. 84-SC-272-MR. The Supreme Court of Kentucky reviewed the issue in some depth, and after a careful review of the evidence, held that there was an abundance of evidence to show a clear intent to commit a theft that day. *Slaughter,* 744 S.W.2d at 410-11.

On this point, the Supreme Court of Kentucky wrote:

> We believe that there is an abundance of evidence to show that James Earl Slaughter had the requisite intent to commit theft. A witness testified that Slaughter had been in the store several days before the crime and was loitering and acting suspiciously. He was, in effect, "casing" the store. It was also shown that the cash register in the store was open, slightly, when an investigating officer entered the store and took a photograph of it. Also, it was testified to that the same cash register was broken. The clear implication is that the cash register was attempted to be opened by the killer, and in so doing, it was broken. A drawer, under the cabinet on which the cash register was located, was wide open when the police came into the store. It was reasonable to assume that the killer was rummaging about near the cash register, looking for money.
>
> Also, the decedent's purse was empty of money when the police found it behind the drawer underneath the cabinet holding the cash register. The purse, moreover, was open, and the wallet inside the purse was partially out of the purse. It is further indication that the killer was searching for money.
>
> The killer of Mrs. Stewart was in the store, armed with a gun and a knife. The purpose of such presence was

> clearly to rob her. His previous scouting of the store, the attempt to open the cash register, the opening of the drawer, and the opening of the purse clearly are evidence of such nature as to show a clear intent to commit a theft. A jury would be totally justified in so believing.

Slaughter, 744 S.W.2d at 410-11.

Clearly, the Supreme Court of Kentucky did not resolve this issue in a fashion that was contrary to, or an unreasonable application of, the clearly established precedent of the United States Supreme Court. In fact, Petitioner relied almost exclusively on state court precedent to argue the independent corroboration requirement of a state rule of criminal procedure, RCr 9.60, as creating a *corpus delicti* requirement. It has been held in the context of a federal habeas corpus proceedings that such state *corpus delicti* requirements are not constitutionally mandated. *See Lucas v. Johnson,* 132 F.3d 1069, 1078 (5th Cir.), *cert. dismissed,* 524 U.S. 965, 119 S. Ct. 4, 141 L. Ed. 2d 765 (1998). *See also Autry v. Estelle,* 706 F.2d 1394, 1407 (5th Cir. 1983) (stating that "[s]uch a state rule of *corpus delicti* has no independent constitutional footing.").

The correct constitutional standard is merely whether, upon the "record evidence adduced at trial, no rational trier-of-fact could have found proof of guilt beyond a reasonable doubt." *See Jackson v. Virginia,* 443 U.S. at 324, 99 S. Ct. 2781. As the above-quoted passage from the decision of the Supreme Court of Kentucky reveals convincingly, ample proof was to be found in the trial record to support a conviction for robbery in the first degree pursuant to KRS 515.020.[15]

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[15] Under KRS 515.020, a person is guilty of robbery in the first degree when in the course of committing a theft, he uses or threatens to use

Because Petitioner's argument regarding independent corroboration of the *corpus delicti* raises merely an issue of state law, and because the proof adduced at trial was more than adequate to satisfy the standard of *Jackson v. Virginia,* the Supreme Court of Kentucky did not rule contrary to, nor unreasonably apply, the precedent of the United States Supreme Court in rejecting this argument.

Petitioner has raised a related argument that involves the use of the robbery conviction as an aggravating factor to support the death sentence imposed by the jury. He maintains that because the evidence at trial was insufficient to prove the only aggravating factor, the first-degree robbery, his sentence of death was a violation of the Due Process Clause. Petitioner raised this issue on direct appeal to the Supreme Court of Kentucky at pages 24-31 of his Brief in *Slaughter v. Commonwealth,* Appeal No. 84-SC-272-MR. The State Supreme Court did not separately discuss the issue, but merely disposed of it as being "without merit."

The clearly established constitutional standard is discussed in *Lewis v. Jeffers,* 497 U.S. 764, 781, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990). In *Lewis,* the Supreme Court explained that the rational fact-finder standard established in *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) applies when a habeas petitioner alleges that an aggravating circumstance was not established to support a sentence of death. As discussed above, the evidence of first-degree robbery introduced at trial was more than sufficient to

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physical force on another person with the intent to accomplish the theft, and he either causes physical injury to any person who is not a participant in the crime, or is armed with a deadly weapon, or uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime. *See* KRS 515.020(1)(a)-(c).

meet the *Jackson* standard. Accordingly, Petitioner is not entitled to habeas corpus relief on this related evidentiary argument.

The final argument that deals with a question of the sufficiency of the evidence presents the proverbial "other side of the coin." Petitioner maintains at argument XXVI of his Memorandum that he was entitled to a directed verdict during the penalty phase, given the uncontroverted nature of certain mitigation evidence (Memo., 160-161). Specifically, he claims that the evidence established, without contradiction, that he did not have a criminal history of violent felonies, that he did not flee or resist arrest, that he had a difficult childhood that included neglect and abuse by his mother, and that he was an insecure man (TE V, 617; IX, 1347, 1388-1389, 1393). Although Petitioner's attorney did not request a directed verdict on these matters, Petitioner did raise the issue on direct appeal at pages 132-133 of his Brief in *Slaughter v. Commonwealth,* Case No. 84-SC-272-MR. The Supreme Court of Kentucky determined, without analysis, that the issue was "without merit."

The Court agrees. The sole precedent of the Supreme Court cited by Petitioner in support of his argument is *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Nowhere in the *Jackson* decision is there any requirement for a directed verdict on mitigating factors in the penalty phase of a capital case. Further, the Sixth Circuit has held in *McQueen v. Scroggy,* 99 F.3d 1302, 1331-32 (6th Cir. 1996), *cert. denied,* 520 U.S. 1257, 117 S. Ct. 2422, 138 L. Ed. 2d 185 (1997) that no constitutional right to a directed verdict on mitigating circumstances exists. Accordingly, the decision of the Supreme Court of Kentucky was neither contrary to, nor an unreasonable application of, any clearly established Supreme Court precedent on this question, there

being none.

False or Destroyed Trial Evidence

Petitioner maintains in argument XXXV of his Memorandum in Support of his Petition that he was denied due process of law in violation of the Fourteenth Amendment because his conviction was obtained by the use of perjured testimony (Memo., 245-248). His argument focuses on the trial testimony of jailhouse informant, William H. Keller. Keller testified that while the two men were in jail together, Petitioner confessed to stabbing the victim after she began to scream. Following Petitioner's conviction, Keller signed two affidavits in which he acknowledged that he lied when he testified that Petitioner confessed to stabbing the victim. Keller stated in both post-conviction affidavits that in all other respects, his testimony was true. He received no inducement to testify, and he initiated the contact with the prosecution prior to trial.

Petitioner raised this issue in his post-conviction RCr 11.42 motion. When he called upon Keller to testify during the post-conviction evidentiary hearing, Keller declined to testify after being advised that his testimony might result in his prosecution on charges of perjury and being a persistent felony offender. Following denial of the motion to vacate in state court, Petitioner raised the issue of Keller's recantation on direct appeal at page 45 of his Brief in *Slaughter v. Commonwealth,* Appeal No. 96-SC-49. On post-conviction appeal, the Supreme Court of Kentucky ruled that Petitioner had failed to show that the prosecution was aware of the perjury (Appendix, A-220). Accordingly, the state court concluded that Petitioner's allegation of perjury was not supported by sufficient particulars to be raised pursuant to a motion to vacate under RCr 11.42 (*Id.*, A-219).

Petitioner now argues that the 1999 decision of the Supreme Court of Kentucky was contrary to, or an unreasonable application of, *Mooney v. Holohan,* 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935); *Pyle v. Kansas,* 317 U.S. 213, 63 S. Ct. 177, 87 L. Ed. 214 (1942), and *Napue v. Illinois,* 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

In *Mooney,* 294 U.S. at 112, 55 S. Ct. 340, the Supreme Court held that a criminal conviction obtained by a state prosecutor solely by the use of perjured testimony known to be false is a violation of the due process of law. Likewise, in *Pyle,* 317 U.S. at 216, 63 S. Ct. 177, the Supreme Court reiterated that an allegation by a habeas petitioner that state authorities obtained his conviction by the knowing use of perjured testimony and the deliberate suppression of favorable evidence was sufficient to state a cognizable claim of a due process violation.

In conjunction with the prohibition against the knowing use of false testimony, the Supreme Court held in *Napue,* 360 U.S. at 265-72, 79 S. Ct. 1173, that the failure of a prosecutor to correct the testimony of a key witness that he knew to be false denied a defendant due process of law. Later, in *Giglio v. United States,* 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), the Supreme Court found a similar due process violation where one prosecutor had promised favorable treatment to a key prosecution witness, who later testified falsely at trial that he received no promises of favorable treatment in return for his cooperation. This knowledge was attributed to a second prosecutor, who was actually unaware of the existence of the promise, or the falsity of the testimony, but nonetheless relied on the perjured testimony to convict the defendant.

Here, Petitioner failed to present any evidence during the state post-conviction proceedings that would suggest, even momentarily, that the prosecutor or any law enforcement officers were aware of the alleged falsity of Keller's testimony. In fact, Keller did not recant that he contacted the police on his own initiative to provide them with Petitioner's alleged confession. Keller also repeatedly testified at trial, without contradiction, that he initiated the contact with the police, that he was offered no inducement to provide the statement, and that no promises were made to him concerning the disposition of the theft charges then pending in state court against him (TE IV, 558; XIII, 1146, 1156). Keller also denied that he had ever "turned state's evidence" before (TE IV, 558). Detective Barrett, who took Keller's statement, testified that Keller did not ask for anything in return for giving his statement or testimony (TE IV, 572-573). Accordingly, the state courts had no evidence before them that would suggest that the prosecution knowingly used perjured testimony or failed to correct testimony that it knew was perjured. For this reason, the disposition of this issue was not contrary to, nor an unreasonable application of, any of the three clearly established Supreme Court decisions relied on by Petitioner.

Petitioner maintains in a related argument that the police acted in bad faith when the tape-recorded statement of Keller concerning Petitioner's alleged confession was "inadvertently" erased prior to trial. According to the detective who took the statement, a secretary at the police department accidentally erased the tape after she transcribed it (TE VIII, 1126). Petitioner argues that this allegedly accidental destruction of a key piece of evidence in a capital murder trial denied him his sole opportunity to cross-examine Keller effectively at trial (Memo., 248-249).

Petitioner raised this issue during the post-conviction proceedings. It was argued at pages 45 through 50 of his post-conviction Brief on appeal in *Slaughter v. Commonwealth,* Case No. 96-SC-49-MR. The Supreme Court of Kentucky rejected this argument, relying upon *Arizona v. Youngblood,* 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

In *Youngblood,* the Supreme Court held that the negligent destruction of evidence that might have been helpful to a criminal defendant does not violate due process. *Id.* Only when law enforcement officials act in bad faith to destroy evidence is the failure to preserve potentially useful evidence a possible due process violation. *See also California v. Trombetta,* 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) (Due Process Clause does not require the preservation of defendant's breath sample).

Petitioner was afforded a lengthy evidentiary hearing during the state post-conviction phase of the criminal proceedings. Yet, the only evidence that was developed was that the tape was accidentally erased by a transcriptionist. Petitioner presented no facts to suggest that law enforcement officials or the prosecutor had any involvement in the accidental erasure of the tape, much less acted in bad faith. Accordingly, the Supreme Court of Kentucky did not act contrary to, nor unreasonably apply, the *Youngblood* decision when it rejected this argument.

PROSECUTORIAL MISCONDUCT

Petitioner raises three arguments in which he makes claims of prosecutorial misconduct. In argument X, he maintains that the prosecutor denied him due process when examining Detective Wilson (Memo., 86-89). Petitioner maintains in

argument XXII that the prosecutor engaged in misconduct by making improper and prejudicial comments during closing argument of the guilt phase (*Id.*, 91-95). Finally, Petitioner, in similar fashion, maintains that the closing argument of the prosecutor during the penalty phase, and his cross-examination of Petitioner during the penalty phase, likewise denied him due process of law (*Id.*, 121-123).

Petitioner raised the first argument regarding prosecutorial misconduct during cross-examination in his Brief on direct appeal at pages 43-49 in *Slaughter v. Commonwealth,* Appeal No. 84-SC-272-MR. He raised the second argument at pages 36-43 of his Brief on direct appeal in the same appeal. His third claim of prosecutorial misconduct was raised at pages 95-101 of his Brief in the same direct appeal. The Supreme Court of Kentucky considered each of these arguments in depth in two separate sections of its Opinion. *Slaughter,* 744 S.W.2d at 411-412, 414-415.

In considering the claims of prosecutorial misconduct in closing argument, the Supreme Court of Kentucky relied on *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974) and *Smith v. Phillips,* 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). The Supreme Court explained that *Donnelly* and *Phillips* require the court to determine whether the prosecutor's conduct was of such an egregious nature as to deny the accused his constitutional right of due process. *Id.* The Kentucky Supreme Court noted that the analysis must focus on the overall fairness of the trial, and not the culpability of the prosecutor. *Id.*, at 411-412. After carefully reviewing all of the challenged conduct of the prosecutor, the Court found nothing improper in the prosecutor's cross-examination of any witness, or in closing argument, with the exception of certain unidentified quotations from the Bible, which the Kentucky Supreme

Court found to be improper but not prejudicial. *Slaughter,* 744 S.W.2d at 415.

The Supreme Court of Kentucky correctly cited the controlling precedent of *Donnelly* and *Phillips.* These cases teach that prosecutorial misconduct will not justify habeas corpus relief unless so egregious as to deny a petitioner a fundamentally fair trial. *Donnelly,* 416 U.S. at 643-45, 94 S. Ct. 1868. The touchstone is the fairness of the trial, not the culpability of the prosecutor. *Phillips,* 455 U.S. at 219, 102 S. Ct. 940. Thus, when analyzing such questions, the federal courts will consider the degree to which the remarks had a tendency to mislead the jury and to prejudice the accused, whether they were isolated or extensive, whether they were deliberate or accidental, and the strength of the competent proof to establish the guilt of the accused. *Serra v. Michigan Dept. of Corr.,* 4 F.3d 1348, 1355 (6th Cir. 1993), *cert. denied,* 510 U.S. 1201, 114 S. Ct. 1317, 127 L. Ed. 2d 666 (1994) (discussing *Phillips*).

When the examples of prosecutorial misconduct relied on by Petitioner are examined in light of the above factors, it becomes clear that the Supreme Court of Kentucky reasonably applied the controlling *Donnelly* and *Phillips* precedent to reject Petitioner's arguments. For example, in argument X, Petitioner maintains that the prosecutor in questioning Detective Wilson induced him to speculate that Petitioner seized upon the description of a white male suspect in order to create an alibi (TE III, 341-342).

What actually occurred is that Petitioner's *own* attorney, during cross-examination of Detective Wilson, asked him, hypothetically, if the white male suspect, "Red," would not have left the area soon after his description was published (TE III, 339). In response to this hypothetical question, the

prosecutor countered with his own hypothetical to Detective Wilson in which he asked the detective if he would not reasonably expect a defendant, who was aware of such a description, to capitalize on that description. When Petitioner's attorney objected, the trial court overruled the objection, noting that, "You were asking for the same conjecture...." (*Id.,* 331-342). Thus, Petitioner's own attorney opened the door for this line of questioning by his hypothetical to Detective Wilson. The prosecutor was merely responding to the situation with his own hypothetical. Petitioner has failed to show how this brief exchange, occasioned by his own attorney, resulted in a fundamentally unfair trial.

During closing argument of the guilt phase, the prosecutor made several challenged statements. He referred to the defense as a "great octopus" or "soldier" defense that was raised to create confusion (TE IX, 1289-1290, 1329). He stated that the defense had tried to "pull a scam," which resulted in an objection that was sustained by the trial court (*Id.,* 1295). The prosecutor also questioned "how sharp" defense counsel was and referred to him as being "snide." (*Id.,* 1315). Further, he asked the jury to "deal with justice in this particular case" after telling them he had done all he could do, the police had done all they can, and the judge had been fair and impartial (*Id.,* 1329). The prosecutor then suggested to the jury that "the Commonwealth has given you a guilty man, and please don't let him go." (*Id.,* 1323). Finally, the prosecutor referred to Petitioner as being "a bit of evil" that walked up to the victim's door (*Id.,* 315).

Although the Kentucky Supreme Court determined otherwise and found the closing argument comments to be within the realm of proper commentary, the real question is whether such comments work to render Petitioner's trial

fundamentally unfair. In this regard, it must be kept in mind that the testimony during the guilt phase showed that soon after the crime, Petitioner confessed his involvement in the robbery/murder to Keith Edwards. On the morning of the crime, he was seen by Laura Edwards and her roommate, Paula Gibson, departing the house with a briefcase containing a knife and gun. Further, Gibson recalled that Petitioner had asked her if she remembered the store on the corner that he had expressed an interest in robbing. Later, when Petitioner returned to the apartment, both women noticed blood spots on various items of his clothing. Police later retrieved clothing that contained a blood type matching the blood type of the victim. Subsequent to his arrest, Petitioner gave several different, albeit incriminating, versions of the events which had him involved to varying degrees in the robbery of the store. The alleged murder weapon, a butcher knife, was recovered at the apartment where Petitioner resided, as was a broken gun. Although the police, and a private investigator retained by Petitioner, searched diligently for the white male known as "Red," who allegedly committed the murder, they were never able to locate this individual.

In light of all of the above evidence, the remarks of the prosecutor in closing argument during both the guilt and the penalty phases, could not be considered to be so egregious as to render the entire trial, or the sentence, fundamentally unfair. On this point, the decision of the Supreme Court of Kentucky was neither clearly contrary to *Donnelly* or *Phillips,* nor did it unreasonably apply either decision.

ADEQUACY OF JURY INSTRUCTIONS

Petitioner raises nine arguments that relate to the constitutional adequacy of the jury instructions during his

trial.[16]

Guilt Phase Instructions

In argument 14, Petitioner maintains that the trial court deprived him of due process in violation of the Eighth and Fourteenth Amendments when it failed to instruct the jury on the offenses of wanton murder and second-degree manslaughter (Memo., 99-109). While the trial court did give wanton murder and second-degree manslaughter instructions based on the participation of Petitioner in an alleged conspiracy to commit first-degree robbery (TR 96-99), the trial court declined to give the requested instructions based on a theory of Petitioner's actual participation in the robbery, even though such instructions were tendered by his attorney (TR 86-87).

Petitioner maintains that the failure to give these tendered instructions was contrary to the holding of *Beck v. Alabama,* 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). In other words, he maintains that the jury was not permitted to consider the option of imposing a lesser-included non-capital offense, where the evidence at trial, including Petitioner's own taped statement to the police, would have supported such a verdict. *See Keeble v. United States,* 412 U.S. 205, 208, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973). Petitioner maintains that the evidence was of such a nature to permit a jury rationally to find him guilty of these lesser-included offenses and to acquit him of the greater. Petitioner

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[16] Arguments 14, 15, 16, 19, 20, 21, 22, 23, 27. Arguments 14, 15 and 16 relate to jury instructions given during the guilt phase of the trial. Arguments 19-23 and 27 focus on instructions during the penalty phase of the trial. The Court shall consider these two groups of arguments separately, beginning with jury instructions during the guilt phase.

maintains that a reasonable juror could have concluded that Petitioner intended only to rob the victim, not to kill her, and stabbed her only to stop her screaming, after he panicked (Memo., 104). Thus, the evidence could have persuaded a reasonable jury that Petitioner stabbed the victim not intending to kill her, but rather disregarded the substantial and unjustifiable risk that she would die, thereby justifying a wanton murder instruction.[17]

Petitioner properly raised this issue on direct appeal at pages 59-62 of his Brief in Appeal No. 84-SC-272-MR. The Supreme Court of Kentucky specifically addressed this issue. *Slaughter,* 744 S.W.2d at 412-13. In rejecting the argument, the Supreme Court held that the jury must be instructed in accordance with the evidence. The Court held there was no evidence that Petitioner acted wantonly, "and no reasonable juror could conclude that appellant consciously disregarded an unjustifiable risk he denied ever taking." *Id.,* at 413. Petitioner maintains that the Kentucky Supreme Court unreasonably rejected his argument contrary to the *Beck* and

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[17] Wanton murder is defined in Kentucky at KRS 507.020(1)(b) as occurring when, under circumstances manifesting extreme indifference to human life, a person wantonly engages in conduct that creates a grave risk of death and thereby causes death. Second-degree manslaughter is defined at KRS 507.040 as being committed when a defendant wantonly causes the death of another.

> Under Kentucky law, a person acts wantonly when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. KRS 501.020(3). The risk must be of such a nature and degree that to disregard it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. Wanton murder and second-degree manslaughter are distinguished by the former occurring under circumstances that manifest extreme indifference to the value of human life.

Keeble decision cited earlier.

In *Beck,* the defendant and an accomplice participated in the robbery of an 80-year-old victim. *Beck,* 447 U.S. at 629, 100 S. Ct. 2382. Defendant testified repeatedly that he neither killed the victim nor intended his death. According to the defendant, he and an accomplice entered the victim's home, and while the defendant was preparing to tie up the victim, his accomplice unexpectedly struck and killed the elderly man. *Id.,* at 630-31, 100 S. Ct. 2382. Under Alabama law at the time, the trial court was precluded from instructing the jury on the lesser-included offense of felony murder due to the status of the prosecution as a capital case. *Id.,* at 630, n.5, 100 S. Ct. 2382.

Beck challenged the constitutionality of the prohibition on lesser-included offense instructions in capital cases. He was convicted of intentional murder and sentenced to death. On certiorari, the Supreme Court reversed his conviction, holding that when the evidence establishes that the defendant is guilty of a serious, violent offense, but leaves some doubt as to an element justifying conviction of a capital offense, the failure to give the jury a "third option" of returning a verdict on a lesser-included offense is a violation of due process in the context of a capital prosecution. *Beck,* 447 U.S. at 636-39, 100 S. Ct. 2382.

Subsequently, in *Schad v. Arizona,* 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991), the United States Supreme Court returned to discuss the rationale of *Beck.* In *Schad,* the defendant was found in possession of the murder victim's vehicle and belongings. The state chose to prosecute the defendant on theories of premeditated and felony-murder. Defendant argued at trial, like Petitioner, that at most, he was a thief, but not a murderer. *Schad,* 501 U.S. at 629, 111 S.

Ct. 2491. The trial court declined to render an instruction on theft as a lesser-included offense, but did instruct the jury on second-degree murder as well as first-degree murder. The jury subsequently sentenced Schad to death. The state courts rejected Schad's argument that *Beck* required the trial court to give an instruction on the lesser-included offense of robbery.

On certiorari, the Supreme Court distinguished *Beck,* noting that the jury in this case was given the option of finding the defendant guilty of the lesser-included non-capital offense, second-degree murder. The Court rejected the defendant's argument that *Beck* required that a jury in a capital case be instructed on every lesser-included non-capital offense supported by the evidence. *Beck,* according to the Supreme Court, was an "all or nothing" situation, where the jury was placed in the dilemma of convicting the defendant of a capital offense, when the proof suggested the reasonable possibility of less culpable conduct, but the only other option offered was to set the defendant free. *Schad,* 501 U.S. at 646-47, 111 S. Ct. 2491. Accordingly, the Court explained, "[t]he goal of the *Beck* rule, in other words, is to eliminate the distortion of the fact-finding process that is created when the jury is forced into all-or-nothing choice between a capital murder and innocence." *Id.* (citing *Spaziano v. Florida,* 468 U.S. 447, 455, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984)). Because the jury in *Schad* was given the "third option" of a second-degree murder conviction, the dilemma of *Beck* did not exist. The second-degree murder instruction was sufficient to protect the reliability of the jury's verdict under the circumstances. *Id.* at 647-48, 100 S. Ct. 2382.

Upon reviewing *Beck* and *Schad,* the Court is left with the firm conviction that the Supreme Court of Kentucky did not act contrary to, nor unreasonably apply, any of these clearly

established Supreme Court precedents. The evidence at trial plainly established that the victim was bludgeoned in the head and stabbed five times in the chest, including a stab wound that penetrated five inches into her chest and pierced her heart. Such facts negate any claim that a reasonable juror could have found that Petitioner acted wantonly, rather than with intent, when he repeatedly stabbed the victim in the chest.

The Sixth Circuit reached exactly this conclusion in *Campbell v. Coyle,* 260 F.3d 531 (6th Cir., rendered August 1, 2001) (available on Westlaw at 260 F.3d 531, 2001 WL 863560), a case that is virtually on all fours with the present one. In *Campbell,* an Ohio defendant was convicted of aggravated murder for the stabbing death of a 78-year-old apartment dweller. The victim was stabbed to death during the course of a break-in, in which certain items of personal property were taken from the victim's apartment. At trial, the defendant argued that he was entitled to a lesser-included manslaughter instruction, given the allegedly disputed evidence of his intent at the time he stabbed the victim. The Ohio state court disagreed and held that given the number and location of the wounds, a reasonable juror would have been compelled to find that the defendant possessed the intent to kill. *Campbell,* 260 F.3d 531, 541-43.

After thoroughly analyzing the *Beck* and *Hopper* decisions, the Sixth Circuit held that the decision of the Ohio Supreme Court was not objectively unreasonable. On this point, the Sixth Circuit wrote:

> A decision as to whether a *Beck* instruction is required is a fact-specific inquiry in which a court must determine whether there were sufficient facts for a reasonable jury to conclude that such an intent did not exist. That was

> precisely the inquiry made by the Ohio court. Indeed, the conclusion reached by the Ohio Supreme Court was that "the number and location of his victim's wounds would compel any reasonable trier-of-fact to find intent to kill."

Id., at 545 (citing *State v. Campbell,* 69 Ohio St.3d 38, 630 N.E.2d 339, 350 (1994)).

The decision of the Kentucky Supreme Court applied exactly the same type of fact-specific inquiry and reached exactly the same conclusion-that the evidence of record did not support merely a wanton mental state. This conclusion was neither objectively unreasonable nor contrary to the holdings of *Beck* or *Schad.* To the contrary, it was imminently reasonable to believe that a defendant who stabs a 56-year-old female victim in the chest five times clearly intends to bring about her death, and a reasonable juror could not have concluded otherwise under the circumstances.

Criminal Facilitation Instruction

Petitioner made no request during the guilt phase for an instruction on criminal facilitation under Kentucky law. Criminal facilitation is defined at KRS 506.080(1) as occurring when a person, who acts with the knowledge that another person is committing or intends to commit a crime, engages in conduct that knowingly provides such other person with the means or the opportunity for the commission of the crime, and which, in fact, aids that other person to commit the crime. Petitioner maintains that criminal facilitation to murder is a Class D felony, to which the evidence at trial entitled him to an instruction. He maintains, as before, that the *Beck* and *Keeble* decisions entitled him to such an instruction, and that the failure of the trial court to so instruct *sua sponte* violated his right to due process.

Petitioner raised this issue at pages 62-65 of his Brief on direct appeal in *Slaughter v. Commonwealth,* Appeal No. 84-SC-272-MR. The Supreme Court of Kentucky did not specifically address this argument, but merely generally dismissed it as being "without merit."

Unfortunately, the nature of the Kentucky Supreme Court Opinion makes it impossible to determine whether the state court considered the claim to be "without merit" because no request for such an instruction was made or because, if requested, the trial court would have been justified in refusing to give such an instruction based on the evidence at trial. Certainly, the former proposition seems more reasonable-that the Kentucky Supreme Court simply found the argument meritless, because Petitioner's attorney had never requested a criminal facilitation instruction. The failure to request an instruction in a criminal trial ordinarily will bar habeas corpus review. *See Campbell v. Coyle,* 260 F.3d 531 (6th Cir., rendered August 1, 2001) (available on Westlaw at 260 F.3d 531, 556-57).

It is undisputed that Petitioner's attorney never requested an instruction on criminal facilitation. Therefore, it is hard to conclude that the failure to grant him relief based on an instruction he never requested was objectively unreasonable or contrary to any Supreme Court precedent. Certainly, neither *Beck. Hopper,* nor *Schad* stands for the proposition that a trial court is compelled to provide the jury, on its own motion, with an instruction on a lesser-included offense, where the court independently determines that the evidence would justify such an instruction. Such a proposition, in fact, is not to be found in the *dicta* of any of those three decisions. Accordingly, the decision of the Kentucky Supreme Court is neither contrary to, nor an unreasonable application of, any

clearly established Supreme Court precedent, regardless of the basis of that decision.

Absence of Extreme Emotional Disturbance

Petitioner maintains in argument 16 of his Memorandum of Law in support of his petition that his right to due process was violated when the trial court omitted the absence of extreme emotional disturbance from the murder instruction and failed to instruct on first-degree manslaughter (Memo., 118-119). Petitioner maintains that at the time of his trial, the absence of extreme emotional disturbance was an essential element of murder under Kentucky law. In support of this proposition, he cites *Bartrug v. Commonwealth,* 568 S.W.2d 925, 926 (Ky.1978), *overruled by Wellman v. Commonwealth,* 694 S.W.2d 696 (Ky.1985), and *Edmonds v. Commonwealth,* 586 S.W.2d 24, 27 (Ky.1979), *overruled by Wellman v. Commonwealth,* 694 S.W.2d 696 (Ky.1985). Petitioner concludes that the omission of this essential element from the murder instruction and the failure to instruct on first-degree manslaughter violated his rights under *Beck v. Alabama,* 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

Petitioner raised this argument in his Brief on direct appeal at pages 66-68 in *Slaughter v. Commonwealth,* Appeal No. 84-SC-272-MR. The Supreme Court of Kentucky did not specifically address this issue, instead finding it merely to be "without merit." *Slaughter,* 744 S.W.2d at 409.

The Supreme Court of Kentucky did not act contrary to, nor unreasonably apply, any clearly established precedent of the United States Supreme Court in rejecting this argument out of hand. Petitioner cites no Supreme Court case which would have entitled him to relief. In *Mullaney v. Wilbur,* 421

U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), the United States Supreme Court discussed extreme emotional disturbance in the context of a Maine statute that required a criminal defendant to prove by a fair preponderance of the evidence that he or she acted in the heat of passion to reduce a murder charge to manslaughter. 421 U.S. at 692-704, 95 S. Ct. 1881. The Supreme Court found that such a requirement violated the due process requirement announced in *In Re Winship,* 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged. The United States Supreme Court, however, later went on to write in *Hankerson v. North Carolina,* 432 U.S. 233, 237 n. 3, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977) that *Mullaney* "does not forbid States from requiring the criminal defendant to present *at least some evidence* to raise a factual issue with respect to heat of passion or self-defense." *id. See Gall v. Parker,* 231 F.3d 265, 287-305 (6th Cir. 2000).

Here, the question of extreme emotional disturbance was never raised even by the "some evidence" standard of *Hankerson, supra.* Petitioner maintained throughout that he was, at most, merely present near the crime scene, but not involved in the stabbing. Even the prosecution testimony of inmate Keller indicated that petitioner simply panicked during the robbery when he stabbed the victim. Thus, whether the jury chose to credit either version of events, no question of extreme emotional disturbance was ever put into proof *in any fashion.* In other words, there was simply nothing for the prosecution to negate. Thus, while the trial court did not instruct the jury on the absence of extreme emotional distress, which was at that time apparently an element of murder in Kentucky, *Gall v. Parker,* 231 F.3d at 288-90, no harmful error occurred.

This conclusion is not contrary the decision of the Sixth Circuit in *Gall v. Parker,* 231 F.3d 265, 287-305 (6th Cir. 2000). The Sixth Circuit addressed the absence of extreme emotional disturbance as an element of murder in *Gall* 231 F.3d at 287-305 (6th Cir. 2000). The Sixth Circuit granted habeas corpus relief in *Gall,* in part, based on exactly the same type of argument that Petitioner now makes. The Sixth Circuit *rejected* the Commonwealth's reliance on the *Wellman* decision as retroactively amending the state law involving the absence of extreme emotional disturbance as an element of murder in Kentucky.

The key distinguishing feature of *Gall,* however, lies in its facts. Gall had a lengthy history of severe mental illness that included severe schizophrenia, accompanied by bouts of uncontrollable rage. Nowhere in the facts established at trial in the present case is there any such evidence of any severe mental illness or any emotional disturbance. At most, the proof would simply suggest that Petitioner panicked during a robbery and stabbed the victim after she began to scream. These facts do not give rise to a basis for an instruction on the absence of extreme emotional disturbance. Accordingly, the *Gall* decision by the Sixth Circuit, which is not, in any event, clearly established precedent of the United States Supreme Court, is materially distinguishable given the dramatically different nature of the facts proved at Petitioner's trial. Once again, the decision of the Supreme Court was not contrary to, nor an unreasonable application of, any clearly established Supreme Court precedent.

Penalty Phase Jury Instructions

Petitioner raises a host of arguments involving the adequacy of the penalty phase jury instructions. First, he maintains that the penalty phase instructions were contrary to the

controlling precedent of *Caldwell v. Mississippi,* 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) and *Woodson v. North Carolina,* 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976), to the extent that they used the term "recommend," rather than "fix," when referring to the jury verdict. Although KRS 532.025(1)(b) specifically states that in death penalty cases, the jury may "recommend" a sentence, Petitioner maintains that the use of the term improperly misled the jury to believe that the responsibility for determining the appropriateness of Petitioner's death sentence rested elsewhere, contrary to *Caldwell,* 472 U.S. at 328-29, 105 S. Ct. 2633.

Petitioner raised this issue on direct appeal in his Brief at pages 137-142 in *Slaughter v. Commonwealth,* Appeal No. 84-SC-272-MR. The Supreme Court of Kentucky did not specifically address this question on the merits. The State Supreme Court simply included the issue among those "without merit."

The Sixth Circuit addressed this exact issue and the *Caldwell* decision in *Kordenbrock v. Scroggy,* 919 F.2d 1091, 1101 (6th Cir. 1990), *cert. denied,* 499 U.S. 970, 111 S. Ct. 1608, 113 L. Ed. 2d 669 (1991). In *Kordenbrock,* the prosecutor advised the jurors during voir dire that their recommendation of death would not be binding on the court, but that the court would accord it great weight. Thereafter, the trial court used the term "recommend" in its instructions when referring to the sentence. Kordenbrock was found guilty and sentenced to death. At the Sixth Circuit, he argued that the prosecutor's conduct violated *Caldwell.* The Sixth Circuit disagreed, noting that the judge had instructed the jury in accordance with Kentucky law as set forth in KRS 532.025(1)(b). The prosecutor's conduct did not misstate or improperly describe the jury's role under state law. *Kordenbrock,* 919 F.2d at

1101. In the absence of any affirmative misstatement or misconduct, the Sixth Circuit found no *Caldwell* violation.

Further, the Sixth Circuit rejected the retroactive application of the decision of *Tamme v. Commonwealth,* 759 S.W.2d 51 (Ky.1988), *cert. denied,* 525 U.S. 1153, 119 S. Ct. 1056, 143 L. Ed. 2d 61 (1999), wherein the Supreme Court held that in the future, juries should be instructed to "fix," not to "recommend," death sentences. The *Tamme* decision was specifically held to be prospective in its application. Although the Sixth Circuit found the issue to be worthy of "serious consideration," it concluded that the argument did not rise to the level of a *Caldwell* violation. The same is true here for exactly the same reasons. Accordingly, the decision of the Kentucky Supreme Court was not contrary to, nor an unreasonable application of, *Caldwell v. Mississippi,* 472 U.S. at 328-29, 105 S. Ct. 2633.

In argument XX, Petitioner maintains that the penalty phase jury instructions denied him due process and a reliable sentencing. Petitioner challenges the instructions in fourteen different respects as being contrary to *Gregg v. Georgia,* 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), *Proffitt v. Florida,* 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976) and *Woodson v. North Carolina,* 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (Memo., 133-149).

Petitioner raised this argument, along with its many subparts, on direct appeal to the Supreme Court of Kentucky at pages 114-132 of his Brief in *Slaughter v. Commonwealth,* Appeal No. 84-SC-272-MR. The Supreme Court of Kentucky did not specifically address this argument or any of its subparts. As before, the argument was simply dismissed as being "without merit."

The first subpart involves Petitioner's claim that he was constitutionally entitled to an instruction that defined the term "mitigation." The Court can find nothing objectively unreasonable in the decision of the Kentucky Supreme Court on this issue. Petitioner cites no clearly established precedent of the United States Supreme Court which would have required the trial court in 1983 to give an instruction to explain or define the term "mitigation." As Respondent points out, in fact, the United States Supreme Court has upheld jury instructions in capital cases that do not define this term. *See Buchanan v. Angelone,* 522 U.S. 269, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998); *Boyde v. California,* 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990); *Johnson v. Texas,* 509 U.S. 350, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993).

The jury, in Petitioner's case, was instructed on eight specific mitigating circumstances that it could consider and was advised that "you shall consider such mitigating or extenuating circumstances as have been presented to you in the evidence and you believe to be true, including but not limited to, such of the following as you believe from evidence to be true." (TR I, 131). This language, and the instruction containing it, were clearly sufficient to satisfy the requirement under *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) that the jury be given the opportunity to consider as a mitigating factor any aspect of the defendant's character, background, personality, record or other circumstance as a basis for a sentence less than death.

Likewise, Petitioner cites no clearly established precedent of the United States Supreme Court, which would have required the jury to be informed concerning the way that the aggravating and mitigating circumstances are to be weighed against one another. Respondent correctly points out that

Kentucky is not a "weighing" state. Kentucky law does not require that the aggravating circumstances outweigh the mitigating circumstances beyond reasonable doubt. *See Skaggs v. Commonwealth,* 694 S.W.2d 672 (1985), *cert. denied,* 476 U.S. 1130, 106 S. Ct. 1998, 90 L. Ed. 2d 678 (1986); *Smith v. Kentucky,* 599 S.W.2d 900 (Ky.1980). Accordingly, no clearly established precedent of the United States Supreme Court was violated or unreasonably applied in an objective fashion. *See Tuilaepa v. California,* 512 U.S. 967, 979-80, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994) (sentencer has broad discretion in determining whether the death penalty should be imposed in a capital case, once the defendant is determined to be a member of the death-eligible case).

Petitioner also argues that the instructions should have advised that the prosecutor bore the burden of proving the existence of the aggravating circumstance beyond reasonable doubt, and that such circumstance outweighed any mitigation. Petitioner, however, cites no clearly established precedent of the United States Supreme Court to support this argument on page 141 of his Memorandum of Law. Further, the jury was instructed during the penalty phase that it could consider the aggravating circumstance in recommending a penalty if it believed the circumstance to be true beyond a reasonable doubt (TR I, 132). The jury also was instructed that it could not recommend a death sentence unless it was satisfied from evidence beyond a reasonable doubt that the aggravating circumstance was true in its entirety (*Id.,* 133). Finally, the jury was instructed that if it had a reasonable doubt about the aggravating circumstance, no finding should be made on that circumstance (*Id.,* 134). These instructions show that the proper burden of proof was amply set forth to the jury.

Next, Petitioner maintains that *Woodson* and *Proffitt* required that the jury make specific mitigation findings. Neither of those decisions, however, so holds. In fact, the Sixth Circuit considered this exact issue in *McQueen v. Scroggy,* 99 F.3d 1302, 1332 (6th Cir. 1996), *cert. denied,* 520 U.S. 1257, 117 S. Ct. 2422, 138 L. Ed. 2d 185 (1997), and held, "McQueen claims that the Constitution requires a judge and a jury to prepare written findings regarding the mitigating circumstances presented at the penalty phase of the trial. There is no case from any federal court that supports this proposition." *Id. See also Kordenbrock v. Scroggy,* 680 F.Supp. 867, 892-93 (E.D.Ky.1988), *aff'd. in part and rev'd. in part,* 919 F.2d 1091, 1120-21 (6th Cir. 1990) (*en banc*), *cert. denied,* 499 U.S. 970, 111 S. Ct. 1608, 113 L. Ed. 2d 669 (1991).

Petitioner also maintains that he was constitutionally entitled to an instruction that specifically limited the jury's consideration of the aggravating circumstance to the sole circumstance enumerated in the instruction. Petitioner speculates that absent such an instruction, the jury may have relied on an impermissible aggravating circumstance-the failure of Petitioner to divulge the home address of the white male suspect, known only as "Red."

Petitioner, however, cites no clearly established precedent of the United States Supreme Court that requires the type of instruction he now maintains he was entitled to receive. As the Supreme Court has noted, "once the jury finds that the defendant falls within the legislatively-defined category of persons eligible for the death penalty, ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." *Tuilaepa,* 512 U.S. at 979, 114 S. Ct. 2630. *See also Buchanan v. Angelone,* 522 U.S. 269, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998).

Petitioner maintains that the trial court also constitutionally erred when it failed to instruct the jury not to be influenced by considerations of passion or prejudice (Memo., 143). Such an instruction, according to Petitioner, was not only required by KRS 532.075(3)(a) but also by *California v. Brown,* 479 U.S. 538, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987), wherein the court indicated that such an instruction serves a useful purpose in limiting the jury's reliance on extraneous emotional factors in a death penalty situation. *Id.,* at 543, 107 S. Ct. 837.

A review of the *Brown* decision does not support the proposition that such an instruction is constitutionally compelled. The *Brown* decision focused on the issue of whether a California state court violated the Eighth and Fourteenth Amendments by giving an instruction in the penalty phase that the jury not be swayed by sympathy, passion or prejudice. The Supreme Court held that the instruction did not violate the Constitution, but served a useful purpose. *Id.* at 543, 107 S. Ct. 837. The fact that such an instruction serves a useful purpose does not mean that it is constitutionally mandated. Subsequent decisions of the Supreme Court to discuss *Brown* do not give such an indication. *See generally Johnson v. Texas,* 509 U.S. 350, 371-72, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993); *Saffle v. Parks,* 494 U.S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990). Accordingly, the decision of the Kentucky Supreme Court to deny relief was not contrary to, nor an unreasonable application of, *California v. Brown,* 479 U.S. 538, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987).

Petitioner also argues that the jury should have been instructed during the penalty phase that it must presume that a life sentence means life without parole (Memo., 143).

Petitioner cites state court cases in support of this argument. *See Pennington v. State,* 364 S.W.2d 376, 380 (Tex. Cr. App. 1962); *Farris v. State,* 535 S.W.2d 608, 614 (Tenn. 1976). He fails to cite, however, any clearly established precedent of the United States Supreme Court that would support such a proposition. Accordingly, he is not entitled to relief on this argument.

Next, Petitioner argues that he was constitutionally entitled to a penalty phase jury instruction that defined reasonable doubt (Memo., 144). He maintains that such an instruction was required to ensure that the jury properly understood the concepts of the burden of proof and reasonable doubt. In support of his argument, Petitioner cites three decisions of the United States Supreme Court. First, he points out that in *Taylor v. Kentucky,* 436 U.S. 478, 486, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978), the Supreme Court criticized the reasonable doubt definition previously used in the Kentucky courts as being "truncated." In *Taylor,* the defendant had been convicted of robbery in state court where the only prosecution witness was the victim, and the defendant was the sole defense witness. In closing argument, the state prosecutor made statements suggesting that the status of the defendant as a defendant tended to establish his guilt. *Id.,* at 487, 98 S. Ct. 1930. The defendant requested an instruction on the presumption of innocence, which was denied by the trial court. *Id.,* at 480, n. 5, 98 S. Ct. 1930. The trial court, however, did give an instruction on reasonable doubt that defined a reasonable doubt as being "a substantial doubt, a real doubt." *Id.,* at 488, 98 S. Ct. 1930.

Although this definition was held not to be reversible error, the Supreme Court noted that several federal circuit courts had criticized the definition as being "confusing." *Taylor, supra,* (citing *United States v. Muckenstrum,* 515 F.2d 568,

571 (5th Cir.), *cert. denied,* 423 U.S. 1032, 96 S. Ct. 564, 46 L. Ed. 2d 406 (1975); *United States v. Christy,* 444 F.2d 448, 450 (6th Cir.), *cert. denied,* 404 U.S. 949, 92 S. Ct. 293, 30 L. Ed. 2d 266 (1971)). Accordingly, the Supreme Court held that on the facts of the case, the refusal to give the requested instruction on the presumption of innocence denied the defendant his right to a fair trial under the Due Process Clause. *Id.,* at 483-90, 98 S. Ct. 1930. The Supreme Court did not hold, however, that a defendant in a capital trial is entitled to an instruction on reasonable doubt during the penalty phase of the trial. *Taylor* was not a capital case, and did not address the question of whether a reasonable doubt instruction was mandated in such situations.

The same can be said of the other two cases cited by Petitioner. Petitioner cites *In re Winship,* 397 U.S. 358, 363-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), apparently for the general proposition that proof beyond reasonable doubt, which is required by the Due Process Clause in criminal trials, is an essential aspect of due process and fair treatment. *Id.,* at 363-64, 90 S. Ct. 1068. While this statement certainly is beyond dispute, the case itself does not hold that a defendant in a capital trial is constitutionally entitled, as a matter of due process, to a jury instruction defining reasonable doubt. In fact, *In re Winship* involved a juvenile convicted in the New York Family Court by a preponderance of the evidence of an act that, if done by an adult, would have constituted larceny. The Supreme Court held that proof beyond a reasonable doubt was constitutionally required when a juvenile is charged with an act that would constitute a crime if committed by an adult. *Id.,* at 365, 90 S. Ct. 1068.

The remaining decision cited by Petitioner, *Estelle v. Williams,* 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976), also is not on point. At most, the *dicta* of *Estelle*

urges the courts to be diligent to guard against the dilution of the fundamental principle that guilt must be established by proof beyond reasonable doubt. The *Estelle* decision, however, involved the question of whether the State could constitutionally compel a criminal defendant to appear before a jury while dressed in prison attire. Although the State could not compel the accused to stand trial in prison clothes, the accused in *Estelle* had failed to make a timely objection and therefore was not entitled to relief. *Id.*, at 503-513, 96 S. Ct. 1691. This holding of *Estelle* does not entitle the present Petitioner to any relief in this case where the issue centers on the adequacy of jury instructions, not prison garb. Accordingly, the Kentucky Supreme Court did not act contrary to, nor unreasonably apply, any of three above decisions, none of which are on point.

At page 144 of his Memorandum of Law in support of his petition, Petitioner argues that the nature of the instructions unconstitutionally misled the jurors to believe that they must find any mitigating factors unanimously in order to give them effect. In raising this argument, Petitioner focuses on instruction no. 5 (TR I, 134) of the jury instructions in the penalty phase. This instruction states that, "The verdict of the jury must be unanimous and must be signed by one of you as a foreman." Petitioner insists that such an instruction runs afoul of clearly established precedent announced in *Mills v. Maryland,* 486 U.S. 367, 384, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988).

In *Mills,* the Supreme Court reversed the capital sentence of a defendant, where the trial court had distributed a verdict form that included individual questions concerning aggravating and mitigating circumstances. The form indicated that the jurors were to answer "Yes" or "No" to each question. *Id.*, at 378, 108 S. Ct. 1860. On the portion of the form that related

to aggravating circumstances, the instructions stated that if the jury unanimously concluded that an aggravating circumstance had been proved, the question should be answered "Yes," but if the jury was not so satisfied, then the question must be answered "No." *Id.* The remaining portion of the form contained the same instructions for mitigating circumstances. *Id.* The final portion of the form instructed the jury to weigh only those mitigating circumstances marked "Yes." *Id.*

In examining the instructions, the Supreme Court concluded that the instructions, as written, may well have precluded the jury from considering specific mitigating factors contrary to *Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). On this point, the Supreme Court concluded:

> [T]here is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought that they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. Under our cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk.

Mills, 486 U.S. at 384, 108 S. Ct. 1860. *See also McKoy v. North Carolina,* 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990) (applying *Mills* to grant habeas corpus relief).

The Sixth Circuit considered a similar *Mills* argument in depth in *Gall v. Parker,* 231 F.3d 265, 320-30 (6th Cir. 2000), *cert. denied,* 533 U.S. 941, 121 S. Ct. 2577, 150 L.

Ed. 2d 739 (2001). In *Gall,* the Sixth Circuit found that an instruction which read, "Your *findings* and verdict must be *unanimous* and must be signed by the Foreman," (*Id.,* at 320-21) created a reasonable likelihood that the jury applied the challenged instructions so as to prevent them from considering constitutionally relevant evidence in rendering a death sentence. *Id.,* at 329. To quote the Sixth Circuit,

> Because we must ensure that juries carry out their roles properly in death penalty cases, because it is reasonably likely that the jury was confused on the necessity of unanimity for mitigation, and because "the verdict of death may not have been imposed had they understood that one juror could block the death sentence if he or she believed that there were sufficient mitigating circumstances, *Kibbe,* 431 U.S. at 154, 97 S. Ct. 1730," we conclude that this error so infected the sentencing phase that the resulting death sentence violated due process.

Gall, 231 F.3d at 329-330 (partial citation omitted).

The present case is materially distinguishable from the decision of the Supreme Court in *Mills* and the decision of the Sixth Circuit in *Gall.* In the case of *Mills,* the jury was presented with a form that required the jury to specifically state in writing which of the mitigating factors it chose to accept. In *Gall,* the jury was provided with an instruction which, in material part, read, "Your *findings* ... must be *unanimous.*" *Gall,* 231 F.3d at 320 (original emphasis). Thus, in both of these decisions, the respective courts concluded that a reasonable likelihood existed that the juries involved could have applied the instructions in a way which prevented them from considering constitutionally relevant mitigation evidence, due to the false assumption that there

must be unanimous agreement upon the existence of a mitigating factor before it could be taken into consideration.

Such a problem does not exist in the present case, where the challenged instruction, instruction no. IV, provided only that the *verdict* must be unanimous (TR I, 134). The instruction on mitigating facts and circumstances, instruction no. I, contained no reference to a requirement of unanimity. To the contrary, the instruction advised the jury that it must consider the mitigating facts that have been presented and believed to be true (TR I, 131).

The only other decision of the Sixth Circuit to discuss this issue in any depth is *Kordenbrock v. Scroggy,* 919 F.2d 1091, 1108-10, 1120-21 (6th Cir. 1990), *cert. denied,* 499 U.S. 970, 111 S. Ct. 1608, 113 L. Ed. 2d 669 (1991). In *Kordenbrock,* the Sixth Circuit, sitting *en banc* in a 13 judge panel, addressed the same question involving instructions that were identical in material part to those given in Petitioner's trial. In that case, the trial court instructed the jury, during the penalty phase, that it could consider the aggravating circumstance if it believed from the evidence beyond a reasonable doubt that it exists. *Id.,* at 1108, n.7. The trial court then instructed on mitigating circumstances stating that in recommending a sentence for the defendant, "You shall consider such mitigating and extenuating facts and circumstances as have been presented to you in evidence and you believe to be true, including but not limited to each of the following as you believe from the evidence to be true...." *Id.,* at 1109, n.7. Thus, the challenged instructions in the *Kordenbrock* decision were the same in their key language as those now before the Court.

The Sixth Circuit was widely divided on this issue. Although the circuit court granted Kordenbrock habeas relief and

directed a retrial as to both liability and sentence, the Judges could not agree on whether the above language was a violation of the principles announced in *Mills v. Maryland,* 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). Eight of the thirteen Judges, writing on this particular issue, concluded that the language of the instructions did not deprive Kordenbrock of due process or any constitutional right. *Kordenbrock,* 919 F.2d at 1121. To quote from the Opinion of the eight dissenting Judges:

> As the district court held, there is nothing in the instructions that would lead the jurors to believe that finding a mitigating factor required unanimity. The instructions carefully stated that finding an *aggravating* factor required such agreement, but it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement. Indeed, it would indicate the opposite. The instructions were not misleading.

Kordenbrock, 919 F.2d at 1121 (Kennedy, J., dissenting). Because the Supreme Court of Kentucky could have reasonably reached a similar conclusion, this Court cannot say that the decision of the Kentucky Supreme Court was objectively unreasonable or contrary to the *Mills* decision.

Petitioner next argues that he was entitled to instructions that: (1) "if any juror does not believe the sentence of death is warranted under these instructions, then a sentence of life imprisonment, or a sentence of 20 years or more, must be imposed;" and (2) "the law presumes that the appropriate sentence for murder is punishment other than death." (Memo., 146). Petitioner does not cite any precedent of the United States Supreme Court to support his first argument.

Further, the jury was instructed that if it has a reasonable doubt as to whether the defendant should be sentenced to death, it should recommend a sentence of life imprisonment instead (TR I, 134). Accordingly, Petitioner received in substance the instruction that he now claims he was denied. As for the latter presumption-of-life instruction, Petitioner cites only one Supreme Court decision in support of his argument. This decision is *Taylor v. Kentucky*, 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978). The Court has already discussed the facts and holding of this case.

Essentially, the Supreme Court held that in a non-capital, criminal trial where the proof was nothing more than a swearing contest between the victim and the defendant, the refusal of the trial court to give a presumption-of-innocence instruction during the guilt phase of trial denied the defendant due process, given the genuine risk that the jury convicted the defendant on the basis of extraneous considerations. *Taylor,* 436 U.S. at 483-90, 98 S. Ct. 1930. As one can see, the facts and holding of *Taylor* simply do not support the proposition that a defendant in a capital trial is entitled to a presumption-of-life-imprisonment instruction during the penalty phase of the trial.

Petitioner also argues that the jury was entitled to an instruction during the penalty phase that they could consider the facts of other cases to determine whether similar defendants, who have committed similar murders, have been sentenced to death. He also maintains that the jury was entitled to a "life option" instruction that would direct the jury that it could sentence Petitioner to life imprisonment, or a term of twenty years or more, even it found that the statutory aggravating circumstance was proven beyond a reasonable doubt (Memo., 147-148).

In neither situation, however, does Petitioner cite a controlling precedent of the Supreme Court which would have required such jury instructions at the time of his trial. At most, he cites *Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) and *Bell v. Ohio,* 438 U.S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 (1978) for their *dicta* that the sentencer must be given the option to consider all of the mitigating circumstances in the evidence that may call for a sentence less than death. Reliance on *dicta* is not sufficient. Nor do the three state court decisions Petitioner cites entitle him to relief. *See State v. Tyner,* 273 S.C. 646, 258 S.E.2d 559, 566 (1979); *State v. Goolsby,* 275 S.C. 110, 268 S.E.2d 31, 40-41 (1980), overruled in part by *State v. Torrence,* 305 S.C. 45, 406 S.E.2d 315 (1991); *Zant v. Gaddis,* 247 Ga. 717, 279 S.E.2d 219, 222 (1981). Such decisions are not adequate grounds in the absence of a controlling Supreme Court precedent.

In argument XXI of his Memorandum in support of his petition, Petitioner argues that he was denied due process during the penalty phase when the instructions failed to include the following mitigating factors for the jury to consider:

1. That James Earl Slawter's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of *intoxication from drugs and alcohol* even though you might have already found the impairment insufficient to constitute a complete defense to the crime.

2. That James Earl Slawter is mentally retarded and/or mentally ill.

3. That James Earl Slawter's capacity to commit the offense

of murder was lessened by mental difficulties and/or the intake of alcohol or drugs, and that his ability to maturely and meaningfully deliberate, reflect and intend the death of Esther Stewart was lessened by these mental problems and/or the effects of alcohol or drugs.

(TR I, 118-119) (original emphasis).

Petitioner argues that the evidence presented at trial was more than adequate to support an instruction on the three requested mitigating factors. In this respect, Petitioner points to his statements to psychologist Johnson that he had used drugs for a long time, including acid, speed and marijuana (TE IX, 1351). Petitioner also used drugs on the day before the robbery/murder (*Id.*). He suggests that the timing of the drug use alone would have supported an instruction. He also argues that there was evidence of mental illness, given his diagnosis of borderline personality disorder with anti-social traits (TE X, 1388). Because the trial court declined to grant the instruction as tendered, Petitioner maintains that the trial court failed to permit the jury to make particularized consideration of the relevant aspects of his character before returning the sentence of death in violation of *Woodson v. North Carolina,* 428 U.S. 280, 303, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) and *Roberts v. Louisiana,* 431 U.S. 633, 97 S. Ct. 1993, 52 L. Ed. 2d 637 (1977). Petitioner further cites *Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) and its requirement that the sentencer not be precluded from considering as a mitigating factor any aspect of the defendant's character or record, or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Id.*

Petitioner raised this issue in his Brief on direct appeal at pages 107-114 in Appeal No. 84-CR-272-MR. The Supreme

Court of Kentucky dismissed the argument without substantive discussion as being "without merit." *Slaughter*, 744 S.W.2d at 409.

The Supreme Court of Kentucky did not act contrary to, nor unreasonably apply, any of the above-cited Supreme Court precedent in rejecting this argument. While it is true that "a jury must be allowed to consider all of the relevant mitigating evidence," no evidence was introduced at trial that Slaughter's capacity to appreciate the criminality of his conduct, or to conform it to the requirements of law, was impaired as a result of intoxication or alcohol use on the day of the crime. To the contrary, although Petitioner advised Dr. Johnson that he had used a variety of drugs in the past, there was no testimony that Petitioner was acting under the influence of drugs or alcohol at the time of the offense. Indeed, Petitioner told Dr. Johnson that he was not feeling any ill effects from his drug use on the day of the murder and robbery (TE X, 1409). Also, no evidence was offered that Petitioner was mentally retarded. Indeed, his IQ was determined to be in the low average range by Dr. Johnson (TE IX, 1382). Further, the trial court did instruct on the mitigating factor of low intelligence. Therefore, Petitioner cannot complain that he did not receive an instruction that included below-average intelligence as a mitigating factor. Because the evidence did not support the additional mitigating factors requested by Petitioner, the trial court was not compelled to grant the requested instructions. The decision of the Supreme Court of Kentucky was not contrary to, nor an unreasonable application of, any existing Supreme Court precedent cited by Petitioner. *See generally Buchanan v. Angelone*, 522 U.S. 269, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998).

Petitioner next argues that his right to due process was

violated when the trial court failed to grant him an instruction during the penalty phase that the indictment had no evidentiary value. The trial court did instruct the jury during the penalty phase on the presumption of innocence, and instructed the jury to apply the presumption in determining whether aggravating circumstance existed (TR I, 129). Petitioner maintains, however, that such an instruction was not sufficient to satisfy *Taylor v. Kentucky,* 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) and *Estelle v. Williams,* 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

Petitioner raised this issue on direct appeal to the Supreme Court of Kentucky at pages 135-137 of his Brief. The Supreme Court found it to be "without merit." This Court agrees. Neither *Taylor* nor *Estelle* reaches the question of jury instructions in the penalty phase of a capital prosecution. The Supreme Court has held that once a defendant is fairly convicted in the guilt phase of a criminal trial, any presumption of innocence evaporates as to the charged offenses of conviction. *See Delo v. Lashley,* 507 U.S. 272, 278-79, 113 S. Ct. 1222, 122 L. Ed. 2d 620 (1993). At the time of the penalty phase, Petitioner had been convicted of first-degree murder and robbery. He was no longer entitled to the presumption of innocence as to murder or robbery or to an instruction that the indictment was not proof against him. Accordingly, the Supreme Court of Kentucky did not act contrary to, nor unreasonably apply, any existing precedent of the United States Supreme Court in refusing to grant relief on this argument.

DEATH PENALTY CHALLENGES

Petitioner raises five arguments that directly challenge the nature of the death penalty and the process by which it is imposed in Kentucky. He maintains, for example, in

argument XXVIII, that Kentucky's death penalty statute, KRS 532.025, violates the Eighth and Fourteenth Amendments to the Federal Constitution, because it: provides no guidance in the role of mitigating circumstances; does not specify who has the burden of proving aggravating circumstances; does not require any findings by the sentencer regarding mitigating circumstances; and, contains vague, open-ended aggravating and mitigating circumstances (Memo., 163-164).

Petitioner argues in his second death penalty challenge, argument XXIX, that Kentucky's death penalty scheme operates in an arbitrary, discriminatory and freakish manner in violation of the same two Constitutional Amendments (Memo., 165-166). He then maintains in argument XXX that electrocution, as a form of capital punishment, is cruel and unusual punishment in violation of the Eighth Amendment (*Id.,* 166). In his fourth argument, Petitioner maintains that he was denied due process of law and a rational sentencing process, when the Supreme Court of Kentucky allegedly denied him access to data it used to review the proportionality of his death sentence (*Id.,* 167). Finally, he insists that his sentence of death is arbitrary, cruel and unusual, because it is disproportionate as applied to the crime and to sentences received in similar cases (*Id.,* 168-171).

Respondent does not challenge the exhaustion of state remedies with regard to any of the above arguments. Review of the state record confirms that these arguments were raised on direct appeal in the Brief filed by Petitioner to the Supreme Court of Kentucky in *Slaughter v. Commonwealth,* 84-SC-272-MR (Brief for Appellant, 142-147,147-154, 154-160, 160-162, 162-163). Accordingly, the issues are properly before this Court.

A lengthy discussion of these issues, however, is not necessary. Petitioner has not cited any clearly established authority which would support any of the above arguments. In fact, all of these arguments have previously been rejected by the federal courts in this Circuit. For example, in *McQueen v. Scroggy,* 99 F.3d 1302, 1333 (6th Cir. 1996), *cert. denied,* 520 U.S. 1257, 117 S. Ct. 2422, 138 L. Ed. 2d 185 (1997), the Sixth Circuit held that Kentucky's death penalty statute is modeled after the Georgia death penalty statute, which consistently has been upheld by the Supreme Court. *Id.* (citing *Gregg v. Georgia,* 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Zant v. Stephens,* 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); *McCleskey v. Kemp,* 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987)). The Sixth Circuit also rejected the claim that the death penalty statute in Kentucky operates in an arbitrary, discriminatory and freakish manner. *Id.* In so doing, the Court noted that the type of empirical evidence relied on by Petitioner amounts to the same kind of statistical studies the Supreme Court found to be insufficient in *McCleskey,* 481 U.S. at 297, 107 S. Ct. 1756. The same is true here. Such studies were relied on by Petitioner in the state courts. Accordingly, Petitioner's argument is no more persuasive in this context that it was in the *McQueen* decision.

The Sixth Circuit also addressed the proportionality argument in *McQueen,* 99 F.3d at 1333. In rejecting the argument, the Court noted that "[t]here is no federal constitutional requirement that a state appellate court conduct a comparative proportionality review." *Id.* (citing *Pulley v. Harris,* 465 U.S. 37, 50-51, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984)). The question is not simply whether any persons have received the death penalty for similar crimes, but also whether the death penalty is proportionate to the crime under review. *Id.* Here, the Supreme Court of Kentucky did

perform a proportionality review and determined that Petitioner's sentence was not disproportionate to the crime committed. Petitioner has offered no clearly established Supreme Court precedent which would demonstrate that this determination of the Kentucky Supreme Court was clearly contrary to, or an unreasonable application of, existing Supreme Court precedent. While the members of the Court were obviously divided on this issue, that division itself does not entitle Petitioner to relief.

Petitioner's argument concerning electrocution as cruel and unusual punishment also has been squarely rejected in this Circuit. This claim was directly addressed by the Sixth Circuit in *In re Sapp,* 118 F.3d 460, 464 (6th Cir. 1997), *cert. denied,* 521 U.S. 1130, 117 S. Ct. 2536, 138 L. Ed. 2d 1035 (1997). The *Sapp* decision involved a civil rights suit filed by a death-sentenced Kentucky inmate who challenged his scheduled execution by electrocution. In setting aside the stay of execution granted by the district court, the Sixth Circuit observed:

> Electrocution has never been found to be cruel and unusual punishment by any American court. *See e.g. In re Kemmler,* 136 U.S. at 443-44, 10 S. Ct. 930; *Ingram v. Ault,* 50 F.3d 898 (11th Cir. 1995); *Felker,* 101 F.3d at 97; *Porter,* 805 F.2d at 943, n.15; *Glass v. Louisiana,* 471 U.S. 1080, 105 S. Ct. 2159, 85 L. Ed. 2d 514 (1985) (Brennan, J., dissenting from denial of certiorari) ("such claims have uniformly and summarily been rejected"). No legislatively authorized method of execution in the United States is outlawed in any jurisdiction by any currently-effective court decision. *Gomez v. Fierro,* 117 S. Ct. at 285, *Rupe v. Wood,* 863 F. Supp. 1307 (W.D.Wash.1994), *vacated as moot,* 93 F.3d 1434 (9th Cir. 1996). The very practice of electrocution has been

> upheld by other courts within the past year, and there is no argument even plausible that there are differences in the level of "evolving decency" among the different circuits or states of the Union, or over the last very few years.

Id., at 464.

Petitioner's argument regarding access to alleged data used by the Supreme Court of Kentucky has previously been reviewed by the District Court in this case. The Court addressed this argument in the context of one of Petitioner's motions for discovery. As the Court noted, the Supreme Court of Kentucky has explained, on more than one occasion, that it does not rely on any non-public data in performing the proportionality review in death sentence cases that is required by KRS 532.075. This fact was explained in *Perdue v. Commonwealth,* 916 S.W.2d 148, 168 (Ky.1995), wherein the Supreme Court of Kentucky explained that the only "data" used by it in performing such a review are the prior published death penalty decisions identified in its opinions. The Supreme Court of Kentucky, prior to *Perdue,* further emphasized in *Harper v. Commonwealth,* 694 S.W.2d 665, 670-71 (1985), *cert. denied,* 476 U.S. 1178, 106 S. Ct. 2906, 90 L. Ed. 2d 992 (1986) that "[i]n no way are mysterious and secret records or data taken into account in our deliberations." *Id.,* at 670-71. Further, the District Court for the Eastern District of Kentucky in *Bowling v. Parker,* Civil Action No. 99-236 (E.D.Ky.2000) held that the petitioner in that case had "suggested no basis or belief that other data exists or that the Supreme Court of Kentucky has changed its method since the *Harper* decision." (Dkt. No. 54, Op.18).

The same is true here. As the Court has already found in its Order on discovery, Petitioner has not shown any concrete

facts that would suggest, even for a moment, that the Supreme Court of Kentucky relies on some secret data base when conducting its statutorily required proportionality review. Further, as noted, such a proportionality review of sentences in state capital murder cases is not a constitutional requirement. *Pulley v. Harris,* 465 U.S. 37, 48-51, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). Recently, in *Skaggs v. Parker,* 27 F.Supp.2d 952, 984-85 (W.D. Ky. 1988), *rev'd. on other grounds,* 230 F.3d 876 (6th Cir.), *amended and superceded by,* 235 F.3d 261 (6th Cir. 2000), the District Court rejected exactly the same argument. *See also Kordenbrock v. Scroggy,* 680 F. Supp. 867 (E.D. Ky. 1988), *rev'd. on other grounds,* 919 F.2d 1091 (6th Cir. 1990) (*en banc*). As the District Court directly stated in its discovery Order when discussing this issue:

> In sum, the time has come to put this issue to rest. The Supreme Court of Kentucky does not maintain a non-public data base. Its proportionality review, under KRS 532.075, is conducted by a review of the records of the published death penalty decisions it identifies in each of its published death penalty opinions. Discovery requests that seek to obtain such non-existence records are a waste of a petitioner's resources and those of the federal courts. The futility of such request is underscored by the repeated holdings of numerous federal courts that habeas petitioners have no federal due process rights that would entitle them to any specific procedure when a proportionality review is performed by a state court pursuant to state statute. Slaughter's arguments to the contrary border upon being specious.

(Dkt. No. 57).

Accordingly, the Supreme Court of Kentucky did not act

contrary to, nor unreasonably apply, any existing Supreme Court precedent when it denied Petitioner's request to obtain a non-existent secret data base.

DOUBLE JEOPARDY

Petitioner maintains in argument XVII that his constitutional protection against double jeopardy was violated when the prosecution used his first-degree robbery conviction as the sole aggravating circumstance to make his murder conviction a capital offense. Petitioner argues that this use of robbery as an aggravating circumstance to increase the punishment for murder from imprisonment to death constituted multiple punishments for the same offense in violation of his guarantee against double jeopardy. In support of this conclusion, he cites *Benton v. Maryland,* 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

Petitioner raised this argument on direct appeal at pages 76-78 of his Brief to the Supreme Court of Kentucky in Appeal No. 84-CR-272-MR. The Supreme Court of Kentucky dismissed the argument without discussion as being "without merit." *Slaughter,* 744 S.W.2d at 409.

Examination of the controlling precedent of the United States Supreme Court persuades the Court that the issue is without merit. The Supreme Court of Kentucky did not act contrary to, nor unreasonably apply, the *Benton* decision. The *Benton* decision is inapplicable on its facts.

Benton involved a Maryland defendant who was tried in state court for burglary and larceny. He was acquitted of larceny but convicted of burglary and sentenced to ten years of imprisonment. On appeal in state court, his case was remanded to the trial court, and he was re-indicted and retried

for both larceny and burglary. Benton protested that retrial on the larceny count violated his double jeopardy protection, given the prior acquittal on that count. On retrial, Benton was found guilty of both offenses and concurrently sentenced to fifteen years for burglary and five years for larceny. On certiorari, the Supreme Court held that his larceny conviction could not stand, given the prior acquittal. *Benton,* 395 U.S. at 797, 89 S. Ct. 2056.

Obviously, Petitioner Slaughter was not acquitted of first-degree robbery during the guilt phase of his capital trial. To the contrary, he was found guilty by proof beyond a reasonable doubt. Therefore, the facts of *Benton* are not those of this case.

The more appropriate authority was rendered by the Supreme Court over forty years ago in *Williams v. Oklahoma,* 358 U.S. 576, 79 S. Ct. 421, 3 L. Ed. 2d 516 (1959). In *Williams,* the defendant was charged with a kidnapping/murder committed while he was attempting to escape from police after a robbery. *Id.* Following his arrest, defendant pled guilty to murder and was given a life sentence. He was later convicted of kidnapping, which was then a capital offense in Oklahoma, the state of conviction. The state sentencing court took into account, in assessing the death penalty, the fact that the kidnapping victim had been murdered. The Supreme Court rejected the argument of the defendant that the use of the prior murder conviction in assessing the death penalty in the kidnapping case was a violation of double jeopardy.

On this point, the Supreme Court held in *Williams* that the trial court was entitled to consider, as one of the aggravating circumstances in the kidnapping, the murder of the kidnapping victim. The Court disposed of the defendant's

double jeopardy argument, holding that: "[I]n view of the obvious fact that, under the law of Oklahoma, kidnaping [sic] is a separate crime, entirely distinct from the crime of murder, the court's consideration of the murder as a circumstance involved in the kidnaping [sic] crime cannot be said to have resulted in punishing petitioner a second time for the same offense." *Id.* at 586, 79 S. Ct. 421.

Later, in explaining the *Williams* decision in *Witte v. United States,* 515 U.S. 389, 399, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995), the Supreme Court stated, "We thus make clear [in *Williams*] that use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment for that conduct within the meaning of the Double Jeopardy Clause." *Id.*

Given the holding of *Williams* and the inapplicability of the facts and *dicta* of *Benton,* no clearly established precedent of the Supreme Court was contravened or unreasonably applied by the Supreme Court of Kentucky in rejecting Petitioner's double jeopardy argument. The Double Jeopardy Clause was not violated merely because, during the penalty phase, the jury properly considered Petitioner's first-degree robbery conviction as an aggravating circumstance.

JUROR QUESTIONING

Another issue raised by Petitioner involves a questions aske in open court by a female juror during the penalty phase of the trial. After Petitioner testified, juror # 5 asked aloud the following question:

JUROR NO. 5: I have a question. He stated that he knew, he and this, "Red" had been friends for

some time. Where did this "Red" live? He would had to visit or something. Where did this "Red" live? Where did he hang out at? Why didn't any of your friends know about you and "Red," and since you ...

THE COURT: That is about five questions there. I'll allow the questions. But there was about four there.

WITNESS
[PETITOINER]:Um, I would say this much. He stays on Hill Street. I won't say what part or what, but he stays on Hill Street.

JUROR NO. 5: You're asking for your life, and nobody can find "Red," andyou refuse to tell his addressso he can be found to save you probably?

WITNESS: I ...

MR. RADOLOVICH: May we approach the Bench?

(TE IX, 1374-1375).

Petitioner's attorney moved for a mistrial based on juror no. 5's alleged predisposition. In counsel's words, "The juror stated, which is Ms. McAtee, that unless he fingers this 'Red,' the jury will find him guilty and sentence him to death. Her statement was that was probably what would happen. It shows a predisposition before the close of any evidence." (TE IX, 1376). The prosecutor responded that the question was valid, and that the juror was simply asking why the witness would not reveal the location of a key suspect when his own life was in the balance (*Id.*). The trial court concluded that, "I don't think it showed a

predisposition. I took the question particularly in the more than the words than in the manner that the juror asked the question that she was asking a pretty valid question and did not show any predisposition." (*Id.*, 1377). The trial court overruled the motion without giving an admonition to the jury, nor was one requested by counsel.

Petitioner now argues that this exchange denied him due process and an impartial capital sentencing jury (Memo., 79-86). According to Petitioner, it was apparent by her questions that juror no. 5 had formed an opinion on the penalty before the jury began its deliberations (*Id.*, 80). Because this opinion was expressed in open court, in the presence of the jury, Petitioner concludes that the impartiality of the remaining jurors was compromised. Petitioner relies on the Supreme Court cases of *Eddings v. Oklahoma,* 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); *Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Gregg v. Georgia,* 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Woodson v. North Carolina,* 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976); and, *Irvin v. Dowd,* 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) in support of his argument.

Petitioner did raise the issue of jury questioning on direct appeal to the Supreme Court of Kentucky at pages 85-91 of his appellate brief in Appeal No. 84-SC-272-MR. The Supreme Court of Kentucky did discuss the substance of this argument as a matter of state law and held that state law permitted jurors to ask questions so long as the questions were pertinent and competent. *Slaughter,* 744 S.W.2d at 413. The Kentucky Supreme Court further held that the question asked by juror no. 5 ran to the credibility of the witness, and therefore was pertinent and legitimate (*Id.*). The Supreme Court of Kentucky did not address this question as a matter

of federal constitutional law.

The reason that the Supreme Court of Kentucky did not address the issue on direct appeal as a matter of constitutional law becomes obvious when one examines Petitioner's Brief on direct appeal. Petitioner's Brief is devoted exclusively to state law decisions. At most, his Brief mentions the term "due process" in a sentence that is followed by a citation to the Fourteenth and Sixth Amendments. That is the sole and entire scope of Petitioner's federal constitutional argument in his Brief on direct appeal. The remainder of the Brief is devoted to Kentucky case law. *See Louisville Bridge and Terminal Co. v. Brown,* 211 Ky. 176, 277 S.W. 320, 322-23 (1925); *Miller v. Commonwealth,* 188 Ky. 435, 222 S.W. 96 (1920). Petitioner also extensively cited state court decisions from other states than Kentucky in his Brief on direct appeal (Memo., 88-91). Accordingly, it is questionable whether Petitioner fully and fairly presented this issue to the state courts as a matter of federal constitutional law in the first instance.

Even if Petitioner did satisfy the exhaustion requirement, the Supreme Court decisions he cites do not address the constitutionality of juror questions during the course of a criminal trial. The Sixth Circuit did address, in general terms, the propriety of permitting jurors to ask questions in a criminal proceeding in *United States v. Collins,* 226 F.3d 457, 461-65 (6th Cir. 2000). *See also U.S. v. Hernandez,* 176 F.3d 719 (3d Cir. 1999). In discussing this issue in the context of a federal prosecution, the Sixth Circuit concluded that "[w]hile allowing jurors to ask questions during criminal trials is permissible and best left to the discretion of the trial judge, the routine practice of juror questioning should be discouraged. Nonetheless, we discern no abuse of discretion in this case." *Collins,* 226 F.3d at 461. Indeed, the Court has

found no Supreme Court decision which expressly prohibits the practice of permitting a juror to ask questions during a criminal trial.

The above federal decisions, and others, do repeatedly caution that the practice should be used sparingly and under careful control of the trial judge. Unfortunately, the types of procedural control suggested by the Sixth Circuit were not in place in Petitioner's trial. The jurors did not ask the questions in writing to permit prior review by the trial court and to afford counsel time for objection and argument. That being said, the trial court in this case specifically found that the question of the juror did not indicate a predisposition as to the outcome of the penalty proceedings. This finding is entitled to a presumption of correctness, absent clear and convincing proof to the contrary. Although Petitioner was afforded an extensive post-conviction evidentiary hearing, no such proof was developed during the state post-conviction RCr 11.42 proceedings.

Subsequently, after Petitioner filed his federal habeas corpus petition, the same juror, juror no. 5, Mary L. McAtee, supplied Petitioner's attorneys, on November 3, 2000, with an affidavit. In her affidavit, McAtee states that she became convinced that Petitioner was guilty well before the jury retired to deliberate during the guilt phase (Dkt. No. 41, Memo. of Law, App. 7, Aff. of McAtee). McAtee also stated in her affidavit that she was "for the death penalty in this case" and had decided to vote for imposition of the death penalty when the victim's bloody clothing was introduced into evidence before the jury retired to deliberate. She further advised that during the penalty phase jury deliberations, three of the jurors were considering a life sentence. McAtee states in her affidavit that she talked to one of the three jurors and explained that with a life sentence,

he could "get out as early as eight years." (*Id.*).

The affidavit of juror McAtee is not sufficient for Petitioner to avoid the entry of summary judgment. Contrary to his arguments, the inclusion of this affidavit as an attachment to his Memorandum in Opposition to Respondent's Motion for Summary Judgment does not raise a material issue of fact. First, as a general rule, a party cannot manufacture a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts the party's earlier testimony. *See generally Gagne v. Northwestern Nat'l. Ins. Co.*, 881 F.2d 309, 315 (6th Cir. 1989); *Laborers' Pension Trust Fund v. Sidney Weinberger Homes, Inc.*, 872 F.2d 702, 706 (6th Cir. 1988) (*per curiam*).

While McAtee is not filing the affidavit in conflict with her earlier testimony, it is entirely contrary to the factual finding of the trial court, which was never factually contradicted during the state post-conviction proceedings. More importantly, any such document that serves as an affidavit must not only be based on personal knowledge, but must set forth facts that would be admissible in evidence. *See Wiley v. United States*, 20 F.3d 222, 225-26 (6th Cir. 1994); *Moore v. Holbrook*, 2 F.3d 697, 699 (6th Cir. 1993). Juror McAtee's statements in her recent affidavit would not be admissible in evidence. *See United States v. Tines*, 70 F.3d 891, 896 (6th Cir. 1995), *cert. denied*, 516 U.S. 1180, 116 S. Ct. 1280, 134 L. Ed. 2d 225 (1996) (Fed. R. Evid. 606(b) precluded the introduction of juror's affidavit that attempted to explain the effect of an *Allen* charge in a criminal trial, wherein Tennessee prison guards were charged with depriving inmates of their civil rights under state law). *See also In re Beverly Hills Fire Litigation v. Bryant Elec.*, 695 F.2d 207, 213 (6th Cir. 1982), *cert. denied*, 461 U.S. 929, 103 S. Ct. 2090, 77 L. Ed. 2d 300 (1983); *Womble v. J.C.*

Penney Co., 431 F.2d 985, 988 (6th Cir. 1970). Accordingly, the affidavit of juror McAtee does not raise a genuine issue of material fact as it would not be admissible, even if Petitioner were entitled to an evidentiary hearing, which he has not shown. Further, the Supreme Court precedent cited by Petitioner does not reach the question of the due process impact of juror questioning during a criminal trial. At most, the *dicta* of several of the decisions cited merely refer to the general right to a fundamentally fair trial. Accordingly, the decision of the Supreme Court of Kentucky is not contrary to, nor an unreasonable application of, any then-existing precedent of the United States Supreme Court.

REPORT OF THE TRIAL JUDGE

Kentucky law provides that in those criminal cases in which a death penalty is imposed, the trial judge is required to prepare a report pursuant to KRS 532.075(1). A standard form, Administrative Office of the Courts ("AOC") Form 085, is used by the Kentucky courts for this purpose. The form is a 12-page form that, when completed, sets out various biographical information about a defendant, data concerning the trial and charged offenses, information concerning a defendant's counsel, the chronology of the case and general considerations (TR II, 150-161). It is prepared in order to help the Supreme Court of Kentucky in its review of death sentences. KRS 532.075(1).

Petitioner has raised several arguments relating to the preparation and adequacy of the AOC-085 report entered by the trial court on December 2, 1983. Petitioner argues that he was denied a meaningful opportunity to offer mitigating evidence in violation of *Gregg v. Georgia,* 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), when the report was completed by the trial court *before* it conducted the

sentencing hearing (Memo., 277-278). According to Petitioner, the final sentencing, entry of the final judgment, and preparation of the AOC-085 report all occurred on the same day, December 2, 1983 (TR II, 150-164). Because defense counsel must by statute be provided a copy of the report and given the opportunity to comment upon it, Petitioner concludes that the trial judge had to have prepared the report prior to the sentencing hearing, thereby allegedly denying him his opportunity to offer mitigating evidence.

Petitioner also argues in argument XXVII that the failure of the trial court to answer one of the questions on the form, in the general consideration section of the form, violated his Eighth and Fourteenth Amendment rights under *Eddings v. Oklahoma,* 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) and *Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). The question at issue is question no. 11 on page 5 of the form. This question, which is in the "offense-related data" section, asks, "although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt?" (TE II, 154). The trial judge declined to answer question 11. Instead, he merely wrote, "inappropriate question" to the side of the answer blocks. Petitioner maintains that this refusal to answer the question, in effect, was a refusal to consider a potentially compelling mitigating circumstance-any possible doubt as to Petitioner's guilt.

Petitioner raised the issue regarding question 11 at pages 91-95 of his Brief on direct appeal. He did not raise the issues regarding the timing of the report's preparation on direct appeal. Instead, the remaining two issues concerning the timing of the report were raised in the post-conviction setting at page 48 of his Brief on appeal in Appeal No. 95-SC-00049. The Supreme Court did address the question on

direct appeal regarding the unanswered question, but declined to address the remaining two arguments in its Opinion on post-conviction appeal, concluding that "[t]his issue was presented on direct appeal." (Dkt. No. 13, App.223).

On direct appeal, the Supreme Court of Kentucky explained that:

> The purpose of the statutory mandate of this procedure and filing of the written report is set out in the statute. KRS 532.075(3) is as follows:
>
> > (a) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factors, and
> > (b) Whether the evidence supports the jury's or judge's findings of statutory aggravating circumstances as enumerated in KRS 532.025(2), and
> > (c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> No specific questions are set out in the statute, that is left up to this Court. Certainly, the trial court should have answered *all* the questions. However, it is clear that he did answer all other questions, and that those questions (and answers) provided all the information necessary to respond to the basic questions provided in the statute quoted above. At worst, this failure to answer the question was a technical error and in no way affected the judge's ability to impose the death penalty. Certainly, it does not affect our ability to thoroughly review the conviction.

Slaughter, 744 S.W.2d at 414.

This decision of the Supreme Court of Kentucky is neither contrary to, nor an unreasonable application of, *Eddings v. Oklahoma,* 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). In *Eddings,* the trial court specifically declined to consider a mitigating factor that was in evidence. The United States Supreme Court held that this refusal violated the rule in *Lockett* as "the sentencer [may not] refuse to consider, as a matter of law, any relevant mitigating evidence." *Id.*

Here, there is no indication that the trial court, as sentencer, refused to consider any mitigating evidence. Certainly, the decision of the trial court to decline to answer question 11 does not support the proposition that the trial court refused to consider mitigating evidence. To understand this conclusion, one must appreciate the nature of the AOC-085 report.

The report is a statutory requirement that is designed not for the trial court, but to assist the Supreme Court of Kentucky in conducting its statutorily-required proportionality review. *See generally McClellan v. Commonwealth,* 715 S.W.2d 464 (Ky.1986), *cert. denied,* 479 U.S. 1057, 107 S. Ct. 935, 93 L. Ed. 2d 986 (1987) (trial judge not required to conduct proportionality review; rather, such review is conducted by a supreme court). The form is merely an administrative tool used by the state supreme court to assist it in its duties under the statute. Indeed, the very language of the statute makes this clear.

Section (1) of the statute provides that when a death penalty is imposed "and upon the judgment becoming final in the circuit court, the sentence shall be reviewed on the record by the supreme court." KRS 532.075(1). Immediately following this sentence in subsection (1) of the statute is a

reference to the report prepared by the trial judge, which the statute requires that the circuit clerk forward to the State Supreme Court within ten days after receiving the transcript. *Id.* The report, therefore, is obviously not a tool to be used by the trial court, but is designed solely for the convenience of the State Supreme Court.

Merely because the trial judge, rightly or wrongly, considered question 11 to be inappropriate does not indicate that the trial judge violated any constitutional duty to give weight to specific mitigating factors. Petitioner cannot point to any portion of the sentencing hearing or other source in the record that gives the slightest indication that the trial judge refused to consider the weight of the evidence in sentencing Petitioner to death in accordance with the recommendation of the jury. Accordingly, Petitioner is not entitled to habeas relief on this argument.

The Court declines to address the remaining two arguments due to Petitioner's procedural default. These arguments were not raised on direct appeal. The Supreme Court of Kentucky specifically declined to address them. Instead, the Court concluded that consideration of the arguments was "not appropriate for an RCr 11.42 motion." (Dkt. No. 13, App. 223). Accordingly, the State's highest court appears to have relied on a procedural bar to preclude consideration of the merits of the remaining two arguments. Petitioner has not shown cause or prejudice sufficient to excuse the procedural default, nor has he established manifest injustice in the absence of consideration of these remaining arguments. Accordingly, the federal courts may not now review them.

VICTIM IMPACT STATEMENT

In argument XI of his Memorandum, Petitioner maintains

that he was denied due process and a rational sentencing when the trial court allowed into evidence a victim impact statement prepared by the victim's husband (Memo., 89-91). Petitioner argues that the information in the statement was immaterial to the proceeding and calculated "to inflame the sentencing jury and deny petitioner a fair, impartial and rational trial and capital sentencing...." (*Id.*, 89-90). In support of this argument, Petitioner relies on *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987) as "partly overruled" by *Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

This issue was first raised in Petitioner's motion to vacate his sentence pursuant to RCr 11.42. The trial court denied the motion without specifically addressing the issue. On appeal, the Supreme Court of Kentucky declined to address the merits of the issue. Instead, the State Supreme Court held that the issue "could have and should have been raised on direct appeal, so it is not appropriate for an RCr 11.42 motion." (Dkt. No. 13, App.225) (citing *Thacker v. Commonwealth*, 476 S.W.2d 838 (Ky. 1972) (RCr 11.42 does not permit a defendant to retry issues which could and should have been raised in the original proceeding or were raised and considered on appeal)).

The quoted language confirms that the Kentucky Supreme Court determined that Petitioner had procedurally defaulted on this issue due to his failure to raise it on direct appeal. The Supreme Court relied on a well-established state law ground that issues that may be raised on direct appeal may not first be brought in a post-conviction motion to vacate. *Thacker*, 476 S.W.2d at 839. Petitioner has not shown cause or prejudice, nor a manifest injustice, sufficient to permit the federal courts to consider the issue on the merits in this proceeding.

Further, consideration of the merits would not have afforded Petitioner any relief. The victim impact statement at issue was not presented to the jury during Petitioner's trial. As Respondent points out, the jury had already returned its verdict at the time that the victim's husband prepared a brief, one-sentence statement that was presented to the trial court subsequent to the return of the verdict. This fact materially distinguishes the present case from both the *Booth* and *Payne* decisions, wherein the victim impact statements in question were introduced into evidence during the penalty phase of the capital trial proceedings (or in the case of *Payne,* a relative of the victim was permitted to testify). *See Booth,* 482 U.S. at 503-09, 107 S. Ct. 2529; *Payne,* 501 U.S. at 814-16, 111 S. Ct. 2597. Accordingly, even were this issue properly before the federal courts, Petitioner would not be able to establish his entitlement to habeas corpus relief.

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner raises eleven arguments that involve ineffective assistance of counsel. Most of these arguments, eight of them, relate to claims of ineffective assistance during the guilt phase of Petitioner's state trial.[18] Petitioner, however, does raise three claims of ineffective assistance that relate directly to the penalty phase of his trial.[19] Two of these claims-that his attorney completely failed to investigate and prepare for the penalty phase and failed to obtain an independent expert report-merit extended discussion. Indeed, these two arguments are the most potent claims made by Petitioner in this proceeding-so potent that the Court firmly believes that Petitioner is entitled to habeas corpus relief, in

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[18] Arguments 37, 38, 39, 40, 41, 42, 43, 45.
[19] Arguments 33, 34, 44.

the form of a new penalty phase.

State Court Proceedings

Upon conviction, Petitioner timely exhausted his available remedies upon direct appeal. The Supreme Court of Kentucky affirmed his conviction and sentence in *Slaughter v. Commonwealth,* 744 S.W.2d 407 (Ky.1987). Petitioner, with assistance of new counsel, began a determined campaign to vacate the sentence by way of an RCr 11.42 motion filed on October 13, 1989 (TR II, 247-266). Among the many arguments raised in the motion was Petitioner's claim that his attorney, Mr. Radolovich, failed to prepare for the penalty phase of the capital trial and did not attempt to obtain an independent mental health expert after receiving Dr. Johnson's damaging report (*Id.*). The trial court conducted a lengthy evidentiary hearing over the course of three days, beginning on September 7, 1994.

The testimony of these witnesses has been summarized in the first portion of this recommendation. Certain testimony, however, bears brief review: in particular, the testimony of Petitioner's attorney, Mr. Radolovich. Radolovich entered the case after his law partner, Ed Harrington, withdrew prior to trial (VHR I, 9/7/94, 9:31:16). After Harrington withdrew, Radolovich continued pro bono to represent Petitioner without any other lawyer assisting him (*Id.*, 9:31:40).

Radolovich testified under oath during the post-conviction hearing that, as a former state prosecutor in New York and as a defense attorney in Kentucky, he had practiced a total of six capital cases (VHR I, 9/7/94, 9:33:00). In fact, as the affidavit of the Executive Assistant District Attorney for New York County would reveal, Radolovich had only worked in the office for less than a year, beginning on May 2, 1977, and

did not try any capital cases during that time (TR VI, 816). Not only was Radolovich never the head of the Organized Crime Unit in New York, as he had testified, it was unlikely, according to the affidavit of the Executive Assistant District Attorney, that Radolovich had tried *any* homicide cases during the ten months that he worked in New York (*Id.*). Radolovich, contrary to his sworn testimony, apparently had *no* prior experience as a defense attorney in a capital murder prosecution.

Radolovich testified during the RCr 11.42 hearing that his trial preparation was entirely focused on the guilt phase of the trial (VHR I, 9/7/94, 9:33:40). In fact, 99% of his preparation was devoted to the first phase of Petitioner's trial (*Id.*, 9:34:30). In the words of an affidavit that he submitted in September of 1989: "My almost exclusive preparation and focus was directed to preparing the guilt-innocence phase of the trial." (Vol. I, App.A-919). It was Radolovich's plan to have Petitioner testify at the guilt phase of the trial (VHR 1, 9/7/94, 9:35:50).[20] Radolovich believed that if the defense was not successful during the guilt phase, the "penalty phase would be a blood bath for us." (*Id.*). Accordingly, Radolovich prepared Petitioner to testify only during the guilt phase and made no preparation for him to testify during the penalty phase. In Radolovich's words, "Our whole thrust was on the guilt phase." (*Id.*, 9:36:49).

Radolovich explained that the defense "really didn't get a chance to prepare [for the penalty phase] except, you know, the rudiments of the penalty phase. We just had a short

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[20] A transcript of Attorney Radolovich's testimony during the RCr 11.42 hearing may be found at the beginning of Appendix, Vol. II, accompanying the petition.

period of time." (*Id.*). In fact, Radolovich apparently did not begin to prepare for the penalty phase until *after* the guilty verdicts had been returned on the first-degree robbery and murder charges. According to the transcript of the hearing:

MCDANIEL: This was something that happened after the guilty verdict was returned?

RADOLOVICH: Yes, sir, uh, both he and I were, uh, upset and, his Honor gave us as much time as we needed, but the, you know, I, we really, nothing in the way of time compared had he testified in, uh, guilt phase, and substantially that was, what we had prepared in guilt phase was what came out in penalty phase.

(VHR I, 9/7/94, 9:37:00).

Radolovich acknowledged that none of Petitioner's family testified during the penalty phase (VHR I, 9/7/94, 9:37:50). Radolovich apparently believed that Petitioner's parents were deceased. In fact, his mother was living in Alabama, and Petitioner had several relatives living locally in Louisville, Kentucky. The only contact that Radolovich had with any of Petitioner's family was a brief telephone conversation with an elderly aunt, who Radolovich did not believe would be helpful due to her age and minimal contact with Petitioner. Radolovich admitted that he did not even think to ask the aunt about the existence and location of other family members who might have testified for Petitioner during the penalty phase (*Id.*, 10:10:13). He acknowledged that it would have been helpful to have the testimony of anyone who could have vouched for Petitioner and show that his family still cared and stood by him (*Id.*, 10:11:30).

Radolovich acknowledged that Petitioner did testify on his

own behalf during the penalty phase. This testimony, however, was against Radolovich's advice, given his view that if a defendant does not testify during the guilt phase, then the defendant should not testify at the penalty phase (VHR I, 9/7/94, 9:54:00). Radolovich acknowledged that during the penalty phase, Petitioner, who had not prepared to testify during the penalty phase, testified that he stole cars to support himself, that he witnessed the murder of a car thief, and that he stole every day for a living (*Id.*, 10:04:30-05:00).

Radolovich further testified that he called Dr. Johnson during the penalty phase because he "felt that I had no alternative to get in [Dr. Johnson's] ... information." (App., Vol. II, Testimony of Radolovich, 23-24). Radolovich agreed that Dr. Johnson testified that Petitioner had given him inconsistent information on Petitioner's family background (VHR I, 9/7/94, 10:05:40). Dr. Johnson testified that Petitioner had anti-social traits and supported himself by stealing cars (*Id.*, 10:06:00-06:15). Further, Radolovich acknowledged that Dr. Johnson testified in the penalty phase that if set free, Petitioner would continue his present lifestyle, and that Petitioner had a predisposition for violence (*Id.*, 10:07:30-07:50). Radolovich admitted that "a lot of what [Dr. Johnson] testified to was not what I would call helpful." (*Id.*, 10:07:50). Radolovich also acknowledged that Dr. Johnson diagnosed Petitioner with a borderline personality disorder with anti-social traits (*Id.*, 10:06:15). Finally, Radolovich acknowledged that Dr. Johnson testified that such individuals, those with borderline personality disorder, as a group, have a poor likelihood of rehabilitation (App., Vol. II, 22).

During the RCr 11.42 hearing, Petitioner also presented the testimony of various family members, including his mother, two brothers and other relatives who were located in

Louisville at the time of the trial. Petitioner also presented the testimony of three psychologists, a social worker, and a family practitioner, along with an expert, attorney Betty Niemi, who testified on the standard for effective assistance in capital cases. The testimony of all of these witnesses was summarized at the outset of this Memorandum Opinion and Order and will not be repeated here.

On June 22, 1995, the trial court entered an Order that overruled Petitioner's RCr 11.42 motion (Dkt. No. 13, App., Vol. I, A1-7). The trial court characterized the ineffective-assistance-of-counsel issue as raising the question of whether, "had 'better' representation been made, would there have been a different result, or, is it mere speculation?" (*Id.*, A-2). The trial court acknowledged the affidavit of Radolovich that most of his efforts had been directed to the guilt-innocence phase of the trial (*Id.*). The trial court set out the direct conflict between Radolovich's testimony concerning his experience in capital litigation and the affidavit of the Assistant District Attorney in New York (*Id.*, A3-4). The trial court advised in its Opinion that it had "wrestled" with the question of how the "apparent discrepancy" affected the merits of the present motion. The trial court concluded that, for the purpose of the motion, "any discrepancy in Mr. Radolovich's testimony must be put aside, and the concentration be focused on other issues." Further, the court concluded that the "testimony is in the record and will inevitably be reviewed by an appellate court." (*Id.*, A-4).

The trial court did not attempt to summarize the mitigating evidence presented during the RCr 11.42 hearing. However, the court did speak to the quality of that evidence. In the words of the court's Opinion:

> As noted, it was impressive. Indeed, in the years following, the court has never been presented at trial with such an accumulation of "mitigating evidence" during a penalty phase. With such evidence presented as the standard for "effective assistance" of counsel, Mr. Radolovich, serving pro bono, and most employed attorneys, would likely fail.

(Dkt. No. 13, App.A-5). The court then continued to note that "[f]or whatever reasons, the trial attorney, relying on the client, was not privy to the defendant's social history." (*Id.*).

The trial court followed this language by raising several questions rhetorically. The trial court asked whether, based on the allegedly sparse discovery, and without assistance from his client, Radolovich was derelict in not discovering and following up on the mitigating evidence discovered by the Department of Public Advocacy (*Id.*). The trial court also rhetorically asked whether, despite Radolovich's "client serving" affidavit, he vigorously pursued a defense for the defendant in both phases of the trial. Both of these questions, which ran to the first prong of the *Strickland* test, were left unanswered by the trial court. In fact, the trial court did not cite *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) anywhere in its Opinion. Instead, the trial court concluded as follows:

> This case was tried in the early years after the death penalty returned. Since that time, perhaps standards for effective assistance of counsel have been raised. But, in the context of 1983, this court, also the trial judge, is not persuaded that Mr. Radolovich provided "ineffective assistance of counsel." Further, even raising the standard, the court is not persuaded that, in 1983, that the now mitigating evidence would have changed that jury's

> verdict; it may have, or not, but searching the corners of this judge's mind, there is the conclusion that the contention is based upon speculation.
>
> * * * * * *
>
> In conclusion, the court is not persuaded that the contentions of "ineffective assistance of counsel" warrant a further conclusion that the jury would have returned a different penalty verdict.

(Dkt. No. 13, App., A5-6).

Petitioner then took an appeal to the Supreme Court of Kentucky, which directly addressed the question of effective assistance of counsel during the penalty phase (Dkt. No. 13, App., A212-214). In its Opinion, the Kentucky Supreme Court set out the standard of *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (*Id.,* A212-213). The Supreme Court also identified the affirmative duty of counsel to investigate, citing *Austin v. Bell,* 126 F.3d 843, 848 (6th Cir. 1997), *cert. denied,* 523 U.S. 1079, 118 S. Ct. 1526, 140 L. Ed. 2d 677 (1998). The Court noted that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Failure to investigate or present mitigating evidence at sentencing may constitute ineffective assistance of counsel." (*Id.,* A213) (citing *Austin,* 126 F.3d at 848). The Kentucky Supreme Court continued to hold, however, that Radolovich's performance, including his decision regarding whether to investigate the background of his client, was not deficient, because:

> Slaughter chose to withhold information from Radolovich, including the identity and location of his

> family members and other information pertinent to his sentencing hearing. Because Slaughter led Radolovich to believe that all but one of his relatives were dead, and conducting an investigation to find family members would be fruitless, it was reasonable under all the circumstances for Radolovich to decide not to investigate.
>
> Although there is generally a duty to investigate under *Strickland,* trial counsel is only required to conduct an investigation based on the information provided by the defendant. *See Thomas v. Gilmore,* 144 F.3d 513 (7th Cir. 1998). As a result, Slaughter was not denied effective assistance of counsel in the penalty phase of his trial.

(Id., A214).

The Supreme Court of Kentucky then addressed the ineffective-assistance-of-counsel arguments regarding mental health experts (Dkt. No. 13, App., A214-218). After again discussing the *Strickland* standard, the Supreme Court concluded that the report of Dr. Johnson was "mixed" and included information both helpful and hurtful to Petitioner's case. Accordingly, the Court reasoned: "Based on Dr. Johnson's report, Radolovich could have reasonably determined that further evaluations could not assist Slaughter, and as a matter of trial strategy, decided to forego those evaluations." (*Id.,* A216). The Court then continued to hold that the information contained in the psychological reports produced by Petitioner's mental health experts during the RCr 11.42 hearing was "equivocal at best." (*Id.,* A217). The Court held that:

> We are not persuaded that this evidence, if presented at the original sentencing hearing, would have swayed the

jury to decide against the capital sentence.

Because Radolovich's decision not to pursue further psychological examinations does not support an ineffective assistance claim, his choice regarding mental health experts was reasonable under the circumstances.

Even if counsel's performance was not reasonable, Slaughter has not proven ineffective assistance of counsel, because he has not shown prejudice, the second prong of the *Strickland* test.

* * * * * *

The information would have presented some mitigating factors, but we are not convinced that they would have overcome the aggravating factors presented by the Commonwealth. Because Slaughter has not demonstrated prejudice, he has not shown ineffective assistance of counsel as set forth in *Strickland*.

(Dkt. No. 13, App., A217-218).

The Strickland Standard

The function of the federal courts in the context of a habeas corpus proceeding is to determine whether the decision of the Kentucky Supreme Court in Petitioner's case was directly contrary to, or an objectively unreasonable application of, the standard for ineffective assistance of counsel announced in *Strickland* as applied subsequently in Supreme Court decisions, such as *Kimmelman v. Morrison*, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) and *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

In *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Supreme Court set forth the well-known two-prong test for determining ineffective assistance of counsel. The first factor requires a defendant to show that the performance of his or her attorney fell below an objective standard of reasonableness. *Strickland,* 466 U.S. at 688, 104 S. Ct. 2052. According to the Supreme Court, "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* Analysis of an attorney's reasonableness requires the court to take into account the skills the lawyer should possess, the guidelines of professional organizations such as the American Bar Association, and the specific circumstances of each case. *Id.; Campbell v. Coyle,* 260 F.3d 531 (6th Cir. 2001) (available on WestLaw at 260 F.3d 531, 2001 WL 863560).

The courts, in examining the decisions of trial counsel, are to do so with tremendous deference and without the benefit of 20/20 hindsight. In the words of *Strickland,* "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689. A perfect performance is not required. Instead, the *Strickland* standard permits a wide range of professionally competent assistance, especially regarding those strategic choices informed by "reasonable investigations." *Id.,* at 690-91, 104 S. Ct. 2052. Even if the decisions of a defendant's trial counsel were mistaken, an ineffective assistance claim will not survive so long as the challenged decision was reasonable. *Id.; White v. McAninch,* 235 F.3d 988, 995 (6th Cir. 2000) (The *Strickland* decision cautions against second-guessing

strategic decisions that did not prove successful).

The second factor of the *Strickland* analysis requires the court to determine whether a defendant was materially prejudiced by the claimed errors of his or her trial counsel. According to *Strickland:* "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S. Ct. 2052. In the context of an ineffective-assistance-of-counsel claim in the penalty phase of a trial, the question is whether there is a "reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695, 104 S. Ct. 2052. *See also Glover v. United States,* 531 U.S. 198, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001) (discussing the *Strickland* prejudice standard).

The United States Supreme Court subsequently applied the *Strickland* standard in *Kimmelman v. Morrison,* 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986), a decision rendered well before Petitioner's conviction became final. In *Kimmelman,* a New Jersey defendant was convicted of rape, following a trial in which his attorney failed to move to suppress damaging evidence in the form of a bedsheet that contained incriminating bodily fluids. During post-conviction proceedings, the attorney explained that he was unaware of the existence of the bedsheet until the time of trial, long after the deadline for filing a motion to suppress had expired. *Id.* at 369, 106 S. Ct. 2574. The attorney had conducted no discovery to obtain information about evidence seized by the police due to his mistaken belief that the prosecution had an affirmative duty to provide the

incriminating evidence to him. *Id.* The United States Supreme Court first noted that "counsel ... has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 384, 106 S. Ct. 2574 (citing *Strickland,* 466 U.S. at 688, 104 S. Ct. 2052).

The Court reiterated, again referring to *Strickland,* that counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary. *Kimmelman,* 477 U.S. at 384, 106 S. Ct. 2574. After stating the *Strickland* standard, the Court concluded that Kimmelman's lawyer had neither investigated, nor made a reasonable decision not to investigate, the case through discovery. *Id.* at 385, 106 S. Ct. 2574. The Court concluded that "[s]uch a complete lack of pretrial preparation puts at risk both the defendant's right to an 'ample opportunity to meet the case of the prosecution,' ... and the reliability of the adversarial testing process." *Id.* (citing *Strickland,* 466 U.S. at 688, 104 S. Ct. 2052). The Supreme Court continued that:

> In this case, however, we deal with a total failure to conduct pretrial discovery, and one as to which counsel offered only implausible explanations. Counsel's performance at trial, while generally creditable enough, suggests no better explanation for this apparent and pervasive failure to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

Kimmelman, 477 U.S. at 386, 106 S. Ct. 2574 (citing *Strickland,* 466 U.S. at 691, 104 S. Ct. 2052).

Recently, the United States Supreme Court returned to *Strickland* in a case that raised the question of ineffective

assistance based on an attorney's failure to adequately prepare and investigate in relation to the penalty phase of a capital murder. *See Williams v. Taylor,* 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). In *Williams,* a Virginia defendant was convicted of robbery and capital murder. The defendant was sentenced to death, following a sentencing hearing in which the jury found a probability of future dangerousness. During the state post-conviction proceedings, the same court found that the failure of the defendant's attorney to discover and present significant mitigating evidence during the penalty phase had violated his right to effective assistance of counsel under *Strickland. Id.* at 371, 120 S. Ct. 1495. The state supreme court, however, rejected this decision of the trial judge and concluded that the defendant had not suffered sufficient prejudice to warrant relief based on *Lockhart v. Fretwell,* 506 U.S. 364, 369, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993).

On certiorari, the United States Supreme Court applied the standard of the AEDPA and held that the defendant was denied his constitutionally guaranteed right of effective assistance of counsel when his trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury. *Williams,* 529 U.S. at 390-98, 120 S. Ct. 1495. The Supreme Court, in reaching this conclusion, noted that the defendant's attorneys had failed to seek out juvenile and social service records due to their mistaken belief that state law did not permit the introduction of such records. *Id.* at 373, 120 S. Ct. 1495. Likewise, the same attorneys had failed to contact a potential character witness, not as a conscious choice, but simply due to their failure to return a telephone call. *Id.* The Court noted that it was undisputed that the defendant had a constitutionally protected right to provide the jury with the mitigating evidence that his trial attorneys had either failed to discover or failed to offer. *Id.* at

393, 120 S. Ct. 1495.

Among the evidence that trial counsel failed to present in mitigation was proof that: the defendant had a "nightmarish childhood" that included criminal neglect so severe that his parents were imprisoned; that he had been severely and repeatedly beaten by his father; that he had been committed to the custody of social services for two years; that he was borderline mentally retarded; that while previously imprisoned, he had received commendations for helping to crack a prison drug ring and for returning a guard's missing wallet. *Id.* at 395-96, 120 S. Ct. 1495.

The Supreme Court in *Williams* went on to find that the decision of the state supreme court was objectively unreasonable for several reasons. First, the state supreme court had mischaracterized the *Strickland* rule in relying on an inapplicable exception recognized in *Lockhart. Herrera,* 506 U.S. at 397, 113 S. Ct. 853. Second, the state supreme court was unreasonable in that it failed to evaluate the totality of the available mitigation evidence, both introduced at trial and the evidence developed during the habeas proceedings in re-weighing the evidence of mitigation versus aggravation. *Id.* at 397-98, 113 S. Ct. 853. Accordingly, the Supreme Court reversed the decision of the federal circuit court and remanded the case so that the defendant ultimately could receive a new penalty phase trial.

Our own Circuit Court has considered the question of ineffective assistance of counsel in the context of a claim of failure to investigate and prepare for the penalty phase of a state capital murder prosecution. In *Carter v. Bell,* 218 F.3d 581, 596 (6th Cir.2000), the Sixth Circuit was faced with a Tennessee capital murder conviction in which trial counsel had failed to investigate mitigating evidence. *Id.* at 596. The

Sixth Circuit concluded that it was clear that trial counsel's performance had been deficient under *Strickland*. *Id.* at 595. The Sixth Circuit acknowledged its previous recognition "that 'when a client faces the prospect of being put to death unless counsel obtains and presents something in mitigation, minimal standards require some investigation.' " *Id.* at 595. (citing *Mapes v. Coyle*, 171 F.3d 408, 426 (6th Cir.1999)) The Sixth Circuit then cited *Rickman v. Bell*, 131 F.3d 1150, 1157 (6th Cir.1997) for the relevant proposition that "the complete failure to investigate, let alone present, existing mitigating evidence is below an objective standard of reasonable representation, and may in fact be so severe as to permit us to infer prejudice." *Carter*, 218 F.3d at 595.

The Sixth Circuit in *Carter* continued to cite another of its cases, *Groseclose v. Bell*, 130 F.3d 1161, 1166 (6th Cir.1997), as a case in which trial counsel "almost entirely failed to investigate the case; he never, for example interviewed the crime incident witnesses or any family members." Counsel in *Groseclose* also failed to present any mitigating evidence during the sentencing stage of the proceedings, including the defendant's military, religious and volunteer records, or any experts who could testify about his sociological or psychological factors. *Id.* Under the circumstances, the Sixth Circuit in *Groseclose* found the attorney's representation to be objectively unreasonable. *Id.* at 595 (*Groseclose*, at 1170-71).

Finally, in the *Carter* decision, the Sixth Circuit discussed another of its decisions involving a failure of trial counsel to investigate and present mitigating evidence in the sentencing phase of a capital murder prosecution, *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir.1997). In *Austin*, the court noted that trial counsel had made little attempt to prepare for the sentencing phase, even though the defendant's relatives,

friends, death penalty experts and a minister were available and willing to testify on his behalf. *Austin,* 126 F.3d at 849. The court wrote in *Austin* that the failure to present any mitigating evidence "does not reflect a strategic decision but rather an abdication of advocacy." *Id.*

Based on the above cases, the Sixth Circuit determined in *Carter:*

> Trial counsel here did Carter a disservice by failing to investigate mitigating evidence. While counsel advanced several reasons for adopting their strategy, their reasons do not excuse their deficiency. The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility. We find that reluctance on Carter's part to present a mental health defense or to testify should not preclude counsel's investigation of these potential factors. Under the American Bar Association guidelines for appointed death penalty counsel, "[t]he investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered." American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.4.1.c (1989). We agree, therefore, with the district court's conclusions that defense counsel made no investigation into Carter's family, social or psychological background and that the failure to do so constituted representation at a level below an objective standard of reasonableness.

Carter, 218 F.3d at 596-97.

Other decisions of the Sixth Circuit have applied *Strickland* to condemn an attorney's absolute failure to investigate and prepare in a criminal trial. In *Lewis v. Alexander,* 11 F.3d 1349 (6th Cir.1993), the Sixth Circuit held:

> This court has recognized that counsel's failure to investigate key evidence or to make a reasonable decision that a particular investigation is not necessary constitutes ineffective assistance, and thus precludes an argument that counsel's course of action was based on an legitimate strategic choice ... In such circumstances, it is not possible to discern a strategy in counsel's omissions, only negligence.

Lewis, 11 F.3d at 1352-53 (citing *Sims v. Livesay,* 970 F.2d 1575, 1580-81 (6th Cir. 1992)).

The Sixth Circuit also applied the *Strickland* standard to a claim of ineffective assistance based on a failure to investigate mitigating evidence in *Glenn v. Tate,* 71 F.3d 1204 (6th Cir. 1995). In *Glenn,* the defendant was sentenced to death after a state trial, wherein his defense attorneys did not begin to prepare for the sentencing phase until after the jury had returned a verdict of guilty. As a consequence, they failed to investigate and present evidence of the defendant's history, character, background and organic brain damage. *Glenn,* 71 F.3d at 1207. Faced with these facts, the Sixth Circuit wrote:

> Although both of Glenn's court-appointed lawyers were experienced criminal defense attorneys, and although they had some eight months to get ready for sentencing proceeding necessitated by a verdict that could hardly have come as a surprise to them, evidence presented to the state trial court at a post-sentence hearing showed that

> the lawyers made virtually no attempt to prepare for the sentencing phase of the trial until after the jury returned its verdict of guilty. It was obvious, or should have been, that the sentencing phase was likely to be "the stage of the proceedings where counsel can do his or her client the most good," *Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir.), *cert. denied*, 493 U.S. 874, 110 S. Ct. 206, 107 L. Ed. 2d 159 (1989),-yet Glenn's counsel failed to make any significant preparations for the sentencing phase until the conclusion of the guilt phase. This inaction was objectively unreasonable. "To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase also ensures that witnesses will not be available." *Blanco v. Singletary*, 943 F.2d 1477, 1501-02 (11th Cir. 1991), *cert. denied*, 504 U.S. 943, 112 S. Ct. 2282, 119 L. Ed. 2d 207 (1992).

Glenn, 71 F.3d at 1207 (partial citations omitted).

While obviously the decisions of the Sixth Circuit are not clearly established precedent of the United States Supreme Court as required by the standard of review under the AEDPA, these decisions are included in this Memorandum Opinion as helpful benchmarks for the application of the *Strickland* standard. These decisions repeatedly demonstrate that complete inaction by counsel in relation to the penalty phase of a capital trial is almost always held to be a deficient performance under *Strickland*. When that deficient performance results in the failure of the jury to hear significant mitigating evidence, such that a reasonable probability exists that the outcome of the penalty hearing may have been affected, the Sixth Circuit has not hesitated to grant habeas corpus relief based on ineffective assistance of counsel in violation of *Strickland*.

The AEDPA Standard

Of course, the duty of the Court is now to determine whether the Supreme Court of Kentucky acted contrary to, or unreasonably applied, the *Strickland* standard in rejecting Petitioner's claim of ineffective assistance of counsel. The Supreme Court of Kentucky appears to have held that because Petitioner did not immediately reveal his true identity as Jeffrey Devine Leonard, and because he did not truthfully reveal the nature of his family situation to his trial attorney, his attorney had no duty to go beyond the information provided by his client in preparing for the mitigation phase of the trial. On this point, the Supreme Court held that: "Although there is a general duty to investigate under *Strickland,* trial counsel is only required to conduct an investigation based on the information provided by the defendant." (Dkt. No. 13, App.A214) (citing *Thomas v. Gilmore,* 144 F.3d 513 (7th Cir. 1998)).

This holding is an unreasonable application of *Strickland.* The *Strickland* decision does not absolve a defense attorney of a duty to conduct a thorough and independent investigation before making such critical decisions as what evidence will or will not be presented during a capital prosecution. To the contrary, the *Strickland* decision specifically advises that a counsel has a duty to make reasonable investigations or to make a reasonable decision that makes a particular investigation unnecessary. *Strickland,* 466 U.S. at 668, 104 S. Ct. 2052. Further, a decision not to investigate must be directly assessed for reasonableness in view of all the circumstances. Accordingly, attorney Radolovich was not absolved of his duty to investigate Petitioner's background, personal history, criminal history, employment history or family history, based

solely on the statements of his client. To the extent that the Supreme Court of Kentucky appears to hold otherwise, its decision is objectively unreasonable under the *Strickland* standard. Contrary to what the Supreme Court of Kentucky appears to hold, an attorney cannot ignore the duty to make a reasonable investigation merely because his or her client is uncooperative or misleads the attorney.

It must be remembered that this is a case in which trial counsel in a capital murder prosecution made absolutely no preparation and no investigation for the penalty phase of the trial. Indeed, counsel did not even begin to prepare for the penalty phase until after the guilty verdict had been returned. Yet, even the most rudimentary pretrial investigation would have revealed to an effective attorney that his client was not forthcoming, even about his own identity. For example, the pretrial discovery provided to defense counsel by the prosecution included the statement of Laura Edwards, which identified Petitioner's proper name, and further identified that Petitioner was from Alabama. Likewise, the report produced by Dr. Johnson indicated on its face that Petitioner had been giving conflicting stories about his background. The psychologist's notes further indicated that the name of Petitioner might be Jeffrey Leonard. Even during the trial, the prosecutor made reference to the name "Jeffrey Leonard." Yet, amazingly, attorney Radolovich made no effort to investigate any aspect of his client's background, even his true name.

On this point, the Court notes that Petitioner could not even correctly spell the name, Slaughter, which he misspelled phonetically as being "Slawter." This fact alone would cause the effective attorney to wonder about the veracity of his client's background information.

More importantly, beyond being unaware of his client's true identity, attorney Radolovich made no effort to acquire any type of records concerning Petitioner. He did not seek to obtain any school records, medical records or other background information, such as, for example, police records from Houston, the city where Petitioner claimed that he lived as a car thief. Had Radolovich attempted to obtain such records, he would have immediately realized that his client's background information was inaccurate.

Indeed, the "effort" of Radolovich to prepare for the penalty phase was so lackadaisical that he did not even think to ask the sole family member he spoke with, one of Petitioner's aunts, whether she knew the whereabouts or existence of any other family members who might have come to Petitioner's assistance during the penalty phase. Radolovich candidly testified that it simply did not occur to him to ask her during their telephone conversation about any other family members who might be willing to have testified on Petitioner's behalf. Had he asked that simple question, he might have learned that Petitioner's mother was living, and that he had two brothers, all of whom were willing to testify on behalf of Petitioner during the penalty phase of the trial. Because Radolovich did not even inquire about the existence of other family members, he threw away his client's best opportunity to present powerful mitigation evidence that might very well have affected the outcome of the penalty phase proceedings.

During the penalty phase, Petitioner stood alone. He was the only individual who testified in any respect concerning his family history. Unfortunately, in keeping with his behavior and emotional problems, Petitioner continued to misstate his background, claiming, as noted, to have lived as a car thief in Houston and to have been a drug addict and purse snatcher. Had attorney Radolovich conducted a reasonable

investigation, and contacted Petitioner's mother and brothers, the jury would have heard a dramatically different story about Petitioner.

Petitioner's mother, Mary Moon, would have directly confirmed the fact that she repeatedly beat Petitioner with any object available, including electric appliance extension cords, leaving scars on his back, arms and legs. The jury would have learned that Petitioner's biological father renounced him, and that he had almost no contact with him (VHR I, 9/7/94, 10:22:45-10:25:30). The jury also would have learned from Mary Moon that Petitioner helped to save his little brother from his drunken stepfather, that it was Petitioner who, due to his mother's absence, was exclusively responsible for caring for his two younger brothers for approximately fourteen hours a day (*Id.*, 10:37:25). The jury also might have learned that Petitioner suffered a serious head injury as a child which went untreated, leaving a visible depression in his skull (*Id.*, 10:38:45).

Mrs. Moon testified during the RCr 11.42 hearing that no one contacted her concerning Petitioner's arrest in Louisville, where her father, stepmother, aunts and uncles lived (*Id.*, 10:49:30). Mrs. Moon testified that she loved her son, did not want to see him die in the electric chair, and would have so testified at his trial if contacted (*Id.*).

The jury also did not hear the testimony of Petitioner's two brothers, Bobby and Vincent Moon. Bobby Moon confirmed that Petitioner took care of him and his brother, made sure they were fed and helped them with their homework (VHR I, 9/7/94, 11:07:20). When Vincent was seriously injured by a bullet that exploded in his eye, it was Petitioner who took the seriously injured child and helped get him safely to the hospital. Bobby confirmed in his testimony that their mother

would beat them with anything she could get her hands on, including belts, switches, extension cords and brooms (*Id.*, 11:09:40). Bobby, like his mother, testified that he loved his brother, and would have been at the trial to support him, had he been given the opportunity.

Vincent Moon also confirmed that Petitioner was primarily responsible for his care-giving due to his mother's absence. Vincent further confirmed the incident in which he lost his eye after a bullet exploded and Petitioner rushed him to the hospital. Vincent further testified that he and his brothers did not abuse drugs and alcohol during the time they were together (VHR I, 9/7/94, 11:27:00). He related that when his mother would confine them to their rooms without food, his brother would quietly bring them food, even though he risked being punished himself.

Petitioner's grandparents, Charlie and Clara Leonard, lived in Louisville. They testified during the RCr 11.42 hearing that they remembered visits by their grandsons during the summer. During these visits, they noticed that Petitioner experienced headaches. Had they been contacted, both of the grandparents would have testified in his behalf at the penalty phase of the capital murder trial (VHR I, 9/7/94, 13:03:00).

None of these family members was given the opportunity to testify on Petitioner's behalf solely due to the absolute failure of Petitioner's trial counsel to conduct any investigation, much less a reasonable one, in preparation for the penalty phase. Indeed, counsel acknowledged that he did not even begin to think about the penalty phase until after the jury had returned its guilty verdict. His sole focus was the guilt phase of trial.

The above-discussed cases make it clear that such conduct is

completely unreasonable, and certainly more than adequate to support a finding of a deficient performance under *Strickland.* Yet, the Supreme Court of Kentucky wrote away the requirement of reasonable independent investigation based on its view that an attorney need only rely on the information provided by his client. On this point, it is ironic to note that attorney Radolovich did not even make a reasonable investigation based on the misinformation Petitioner provided him. The result is that the decision of the Kentucky Supreme Court is doubly unreasonable. Not only did it apply the wrong standard under *Strickland,* but Radolovich did not even meet the erroneous standard applied by the Kentucky Supreme Court, since he conducted no investigation whatsoever. As a result, the penalty phase proceeding was entirely unreliable.

Petitioner, a 20-year-old, African American male, with no prior violent felony history, was sentenced to death by a jury that not did not know his true background, family and social history, or even his true name. This absolute ignorance concerning Petitioner's true identity and family history falls squarely on the shoulders of his trial counsel, who did virtually nothing to prepare for the penalty phase of the trial. The result was that the penalty phase of the trial became a fundamentally unfair proceeding that lost any indicia of reliability, given the inactivity of counsel, who subsequently misstated his capital trial qualifications. As a result, more than a fair probability exists that the outcome of the penalty proceedings would have been different had Petitioner been represented by attorneys who chose to prepare for the penalty proceeding prior to the return of the guilty verdict. Any conclusion by the Kentucky Supreme Court to the contrary is an objectively unreasonable application of the *Strickland* standard that erases from *Strickland* the requirement of a reasonable investigation. The subsequent decision of the

Supreme Court in *Williams* underscores the unreasonableness of the decision of the Kentucky Supreme Court in this case.

The Court likewise concludes that the Supreme Court of Kentucky was unreasonable in its treatment of Petitioner's claim that his attorney rendered ineffective assistance in failing to secure the services of any mental health expert witnesses during the mitigation phase of the trial. On this point, the Supreme Court of Kentucky simply found, without elaboration, that the additional testimony presented by the mental health experts in the post-conviction proceeding would not have swayed the jury to decide against a capital sentence. The Supreme Court of Kentucky neither set forth the additional mitigating evidence presented by these mental health experts nor weighed that proof against the nature of the testimony that was presented by Dr. Johnson during the penalty phase. As the *Williams* decision teaches, this failure to review mitigation evidence that was not presented, and to weigh such evidence in the balance, in determining whether prejudice exists under the *Strickland* standard is itself an unreasonable application of *Strickland.*

Here, Petitioner's trial counsel did not make a conscious decision not to pursue an additional expert opinion on Petitioner's mental health. To the contrary, Petitioner's counsel apparently was unaware that he could request court funds to hire an expert who would work with the defense to evaluate his client's emotional and mental health status. An examination of Petitioner's motion for a competency determination suggests that Radolovich believed that the indigency of his client compelled him to obtain an evaluation through Dr. Johnson at KCPC (TR I, 27). Yet, Dr. Johnson clearly was not acting on Petitioner's behalf, but made a non-confidential evaluation that was intended to be used by the court and was shared with the prosecution. Further, it does

not appear from the record that Petitioner's attorney ever explained to his client in any detail the purpose and limitations of Dr. Johnson's evaluation. Dr. Johnson was directed to determine Petitioner's competency, not to provide the defense with a confidential evaluation. Yet, Petitioner's attorney made no efforts to have any other mental health professional review Dr. Johnson's report, or to produce a separate report. This omission does *not* appear to be the part of any trial strategy whatsoever, but was simply the result of the trial counsel's sole focus on the guilt phase of trial.

A multitude of facts would have caused a reasonable attorney to be deeply concerned about the adequacy and accuracy of Dr. Johnson's report. Dr. Johnson, who had received his degree a mere two years prior to evaluating Petitioner, was not able to complete the full battery of tests. As his report notes, Dr. Johnson was not able to complete the Minnesota Multiphasic Personality Inventory (MMPI), a key screening test. Dr. Johnson's report also indicated on its face that Petitioner gave incomplete and inconsistent statements concerning his family history and background. Notwithstanding such inconsistencies, Dr. Johnson proceeded to rely on the Rorschach Ink Blot Test to arrive at a diagnosis of borderline personality disorder.

Two of the mental health experts who testified during the RCr 11.42 hearing, Drs. Drogin and Engum, both testified that the Rorschach Test, or Ink Blot Test, has been determined to be of questionable validity. Dr. Engum testified that the Ink Blot Test is not a valid substitute for the MMPI, which is an absolute necessity for a competent forensic evaluation (VHR I, 9/7/94, 13:53:00-54:40). According to Dr. Engum, he has done research on the Rorschach Test, and it simply does not prove what it purports to prove (*Id.*, 13:54:45). While the Ink Blot Test may be

satisfactory for use in psychotherapy, Dr. Engum testified that it is not appropriate for making life and death clinical evaluations (*Id.*, 13:55:40).

Dr. Engum also did not accept Dr. Johnson's conclusion that Petitioner had a borderline personality disorder (VHR I, 9/7/94, 14:01:15). According to Dr. Engum, Dr. Johnson did not perform any test that would have permitted him to reach that diagnosis (*Id.*, 14:03:50). Dr. Engum, however, did give Petitioner two tests that had specific scales to detect borderline personality. No significant indication of borderline personalty was revealed by either (*Id.*, 14:01:15).

Dr. Engum's diagnosis for Petitioner, after an extensive battery of testing, was cognitive disorder, not otherwise specified (VHR I, 9/7/94, 13:37:30). According to Dr. Engum, Petitioner displayed two major areas of cognitive deficit. First, he had attention deficit disorder; and second, he had difficulty in learning and acquiring information verbally (*Id.*, 13:35:00-35:38).

Significantly, Dr. Engum testified that he determined Petitioner to have potential for rehabilitation based on the results of the tests that indicated that if Petitioner can interact freely and develop trust, he will be able to overcome the vast majority of his problems (*Id.*, 14:04:50). Dr. Engum testified that, with appropriate psychotherapy, Petitioner could tear down the barriers he had established as the result of his difficult childhood, and thereby dissipate the feelings of anger, loneliness and rejection to become a happier, more content individual (*Id.*, 14:05:35). The doctor concluded that Petitioner had sufficient intellectual development to respond to psychotherapy. In fact, the doctor concluded that Petitioner's thought processes were remarkably good, and that he "is an innately intelligent individual...." (*Id.*,

13:46:43).

Dr. Engum was not the only mental health expert who found serious flaws with Dr. Johnson's conclusions. Dr. Eric Drogin, a licensed clinical psychologist who had access to the raw data used by Dr. Johnson, reviewed Dr. Johnson's report. As noted, Dr. Drogin testified that the Rorschach Ink Blot Test should not be used in a forensic evaluation (VHR II, 9/8/94, 13:25:30).

Dr. Drogin also found that Dr. Johnson made errors in scoring a critical test, the Shipley Test. As a result, Dr. Drogin had no confidence in the IQ score obtained by Dr. Johnson in his report (*Id.*, 13:30:50). Given the discrepancy between the vocabulary and abstract scores on the Shipley Test, Dr. Johnson should have been aware that Petitioner had a definite reading problem that would have affected his ability to take the MMPI (*Id.*, 13:34:40). The fact that the Incomplete Sentence Test was given to Petitioner orally raised a question in Dr. Drogin's mind about whether the tester felt that Petitioner had a reading problem (*Id.*, 13:41:50).

Finally, Dr. Drogin noted that Petitioner's score on the Competency Screening Test was a borderline score of 20. This score should have raised questions as to whether Petitioner was actually competent to stand trial (*Id.*, 13:55:50). Yet, the borderline nature of the score was not reported to the trial court (*Id.*, 13:58:50).

Dr. Drogin concluded that to conduct a proper forensic evaluation, Dr. Johnson should have done neurological screening and assessed Petitioner's reading ability (*Id.*, 13:59:30). Based on the information he reviewed, Dr. Drogin could not have confidence in the diagnosis obtained

by Dr. Johnson (*Id.*, 14:01).

Attorney Radolovich was not aware of any of these deficiencies in Dr. Johnson's report. Even though the report indicated on its face that Petitioner was inconsistent in providing background information, and was unable to complete the MMPI, Radolovich simply accepted the conclusions of Dr. Johnson and made no further efforts whatsoever to obtain any independent expert review of Dr. Johnson's report. This report was directed toward Petitioner's competency to stand trial, not to preparing for Petitioner's defense at trial. The report also was not confidential. Radolovich made no effort to prepare Dr. Johnson for testifying during the mitigation phase of trial, but merely elected to keep the doctor on stand-by.

During the mitigation phase of the trial, Petitioner's own attorney brought out through the testimony of Dr. Johnson that his client led a nomadic, lawless lifestyle, and due to his supposed borderline personality disorder would be an unlikely candidate to be successfully rehabilitated, but rather would continue in such a lifestyle and potentially commit violent acts if released. As the testimony of Drs. Engum and Drogin has shown, these conclusions were extremely questionable, a fact that a reasonably prepared defense counsel would have known. Because Radolovich simply chose not to prepare for the penalty phase, apparently was not aware that he could have the court pay for a defense mental health expert, and ignored obvious indications on the face of the report that its conclusions were based on incomplete background information and testing, he eliminated any possibility that his client would have favorable testimony such as that of Drs. Engum and Drogin.

The result of such ineffective assistance is that the jury never

saw Petitioner for whom he really was, not James Slaughter, a fictitious entity, but Jeffrey Leonard, a physically abused, neglected child, who was abandoned by his father and forced to care for his brothers; a child who, while innately intelligent, suffered from a significant learning disability that went undiagnosed throughout his childhood. The jury never learned that Jeffrey Leonard was an individual who, with proper treatment, was a good candidate for rehabilitation, who had loving family members who would stand by him and support him.

Instead, they saw "James Earl Slaughter," in many senses, the man who never was, standing alone and defiant. Slaughter was a man testified recklessly; a man who apparently was so unloved and so uncared for that not a single individual, relative or friend would vouch for him, though his life hung in the balance. There is one reason, and one reason only, that the jury faced this dismal picture-a complete failure of his trial attorney to meaningfully prepare or investigate for the penalty phase of the trial. Under such circumstances, a reasonable probability certainly existed that the result of the penalty phase would have been different had Jeffrey Leonard been represented by an attorney who treated this critical portion of the trial as something more than an afterthought.

Yet, the Supreme Court of Kentucky brushed aside all of the additional mitigating evidence, evidence so powerful that the trial judge stated in his Opinion that he had never seen the likes of such an accumulation of mitigating evidence before. The Kentucky Supreme Court did so without even identifying the additional mitigating evidence presented during the post-conviction hearing. The Court merely concluded, without elaboration, that the additional mitigating evidence would not have altered the outcome (Dkt. No. 13,

App.A217-218). The full extent of the analysis of the Kentucky Supreme Court is found in a single brief passage in its Opinion stating [t]he information [discovered by subsequent investigation and psychological examinations] presented some mitigating factors, but we are not convinced that they would have overcome the aggravating factors presented by the Commonwealth. Because Slaughter had not demonstrated prejudice, he has not shown ineffective assistance of counsel as set forth in *Strickland.* (*Id.*, A218).

This conclusion is certainly an unreasonable application of *Strickland.* It is unreasonable because it fails to provide any analysis of the additional mitigating evidence presented or even to identify such evidence. If this standard were to be applied and held reasonable in the application of the *Strickland* test, then Opinions of the state courts, such as that now under review, would be absolutely immune from meaningful review under *Strickland.* The state courts merely would have to proclaim, without elaboration, that they had examined the evidence and remained unconvinced that the undiscovered mitigating evidence would have overcome the evidence of aggravating factors. No identification of the additional mitigating evidence would be required nor would the courts have to weigh carefully against the aggravating evidence.

The *Strickland* standard for determining prejudice demands something more than an absolving declaration devoid of analysis. Because the Supreme Court of Kentucky unreasonably applied the *Strickland* standard when it determined that Petitioner received effective assistance of counsel in the mitigation phase, where counsel was grossly deficient, and the state post-conviction hearing revealed extensive mitigating evidence that most probably would have affected the outcome, Petitioner is entitled to habeas corpus

relief to the extent of having a new penalty phase trial, a trial at which he is actually represented by an attorney who conscientiously and carefully prepares and attempts to show the jury that Jeffrey Leonard, not the non-existent James Slaughter, is not deserving of death. What the outcome of that proceeding will be, of course, is impossible to determine, but the Court can say with complete confidence that Petitioner has demonstrated, quite clearly, that a reasonable probability exists that the outcome of his penalty trial would be different based on the mitigating evidence, both expert and lay, that was overlooked by his prior attorney.[21]

Accordingly,

IT IS ORDERED that the respondent's motion for summary judgment is **DENIED.**

IT IS FURTHER ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **GRANTED IN PART,** insofar as it seeks a new penalty phase trial, but is otherwise **DENIED.**

IT IS FURTHER ORDERED that as the petitioner has made a substantial showing of the denial of a constitutional right, 28 U.S.C. § 2253(c)(1), a certificate of appealability is

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[21] Petitioner has raised a number of other ineffective assistance arguments. These arguments run to issues that relate to the guilt phase of his trial. He claims that his counsel was ineffective for failing to: (1) request a competency hearing; (2) obtain co-counsel to assist him; (3) conduct an inadequate voir dire; (4) object to evidence of other crimes; and (5) request an instruction on criminal facilitation. The Court has already discussed each of the underlying constitutional issues and has found them to be meritless given the standard of the AEDPA. As a result, a discussion of these additional guilt trial claims of ineffective assistance is not necessary, as counsel's performance was not deficient in any respect other than that set forth above.

GRANTED.

IT IS FURTHER ORDERED that the motion by the petitioner for leave to file a memorandum in excess of forty pages is **GRANTED,** which memorandum has been duly considered.

IT IS FURTHER ORDERED that the motion by the respondent for leave to file a memorandum in excess of forty pages is **GRANTED,** which memorandum has been duly considered.

IT IS FURTHER ORDERED that all remaining motions are **DENIED AS MOOT.**

Appendix C

RENDERED: APRIL 22, 1999
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
96-SC-49-MR

JAMES EARL SLAUGHTER — APPELLANT

V.

COMMONWEALTH OF KENTUCKY — APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE EARL O'BANNON, JR., JUDGE

83-CR-387

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, James Earl Slaughter, was convicted of murder and first-degree robbery and sentenced to death. He appealed to this Court as a matter of right, and his conviction was affirmed in *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407 (1987), *cert. denied*, 490 U.S. 1113, 109 S. Ct. 3174, 104 L. Ed. 2d 1036 (1989). Slaughter then made a motion to vacate his convictions under Rules of Criminal Procedure (RCr) 11.42. An evidentiary hearing was conducted, after which the trial court denied Slaughter's motion for post-conviction relief. He now appeals the denial of that motion to this Court as a matter of right.

Slaughter presents seventeen issues on appeal, all of which will be addressed herein. For the reasons discussed below, we affirm.

I. ASSISTANCE OF COUNSEL DURING PENALTY PHASE

Slaughter first argues that he was denied effective assistance of counsel during the penalty phase of his trial because his trial counsel, Fred Radolovich, did not conduct an adequate investigation into Slaughter's background.

Slaughter was tried and convicted under the name James Earl Slaughter, but the name given him at birth was Jeffrey DeVan Leonard. During preparation for the trial, Slaughter told Radolovich that his parents were dead, and the only living member of his family was an elderly aunt in Alabama. Radolovich talked with the aunt, but decided that the information she had would not be helpful to Slaughter, in part because she was elderly and hadn't seen him in some time.

In fact, however, Slaughter's mother was very much alive and she testified at the evidentiary hearing. Slaughter's two half-brothers also testified and provided information which, if available at the original trial, could have been presented to mitigate Slaughter's death sentence pursuant to KRS 532.025(2)(b). Slaughter argues that he received ineffective assistance of counsel during the penalty phase of his trial because Radolovich did not investigate possible mitigating circumstances under his aliases, "James Earl Slawter" and "Jeffrey DeVan Leonard."

The Supreme Court of the United Stated defined the parameters of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In judging a claim of ineffectiveness, the standard is "whether counsel's conduct so undermined the

proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064. Both of two components must be proven to show that counsel's assistance was "so defective as to require reversal of a conviction or death sentence." *Id.* at 687, 104 S. Ct. at 2064. "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Id.*

One of the affirmative duties of counsel is the duty investigate his client's case. *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1526, 140 L. Ed. 2d 196 (1998); *Abdur' Rahman v. Bell*, 999 F. Supp. 1073 (M.D. Tenn. 1998). Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id.* Failure to investigate or present mitigating evidence at sentencing may constitute ineffective assistance of counsel. *Austin*, 126 F.3d at 848 (citing *Glenn v. Tate*, 71 F.3d 1204, 106-08 (6th Cir. 1995), *cert. denied*, ___ U.S. ___, 117 S. Ct. 273, 136 L. Ed. 2d 196 (1996).

In determining whether Radolovich's performance was deficient, we must inquire whether his decision not to investigate Slaughter's background "was reasonable considering all the circumstances." *Strickland*, 466 U.S. 688, 104 S. Ct. at 2065. The Court explored the concept of reasonableness as follows:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular,

> what investigation decisions are reasonable depends critically on such information. . . . And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Id. at 691, 104 S. Ct. at 2066.

Slaughter chose to withhold information from Radolovich, including the identity and location of his family members and other information pertinent to his sentencing hearing. Because Slaughter led Radolovich to believe that all but one of his relatives were dead and conducting an investigation to find family members would be fruitless, it was reasonable under all the circumstances for Radolovich to decide not to investigate.

Although there is generally a duty to investigate under *Strickland*, trial counsel is only required to conduct an investigation based on the information provided by the defendant. As a result, Slaughter was not denied effective assistance of counsel in the penalty phase of his trial.

II. ASSISTANCE OF COUNSEL REGARDING MENTAL HEALTH EXPERTS

Second, Slaughter argues that he received ineffective assistance of counsel because Radolovich did not (1) investigate Slaughter's social history; (2) request funds for independent experts; (3) insure that the examination of

Slaughter was extensive enough; and (4) request further examinations of Slaughter after receiving results from the first examination.

Slaughter was evaluated by Dr. Phillip Johnson of the Kentucky Correctional Psychiatric Center (KCPC) in 1983. In a six-page report, Dr. Johnson outlined several tests given to Slaughter and Slaughter's responses to those tests. Based on his interaction with and observation of Slaughter, Dr. Johnson found that Slaughter was competent to stand trial because he would be able to actively and constructively participate in the legal process. Slaughter was evaluated subsequently by several mental health professionals in conjunction with his RCr 11.42 motion to the trial court, and those professionals provided information which could have been introduced as mitigating evidence in the sentencing hearing. After an evidentiary hearing was conducted on Slaughter's RCr 11.42 motion, the trial court found that "the contentions of 'ineffective assistance of counsel' [do not] warrant a further conclusion that the jury would have returned a different penalty verdict." *See Findings and Conclusions*, p. 6, No. 83CR0387, entered June 22, 1995.

As previously discussed, the guidelines for ineffective assistance of counsel are found in *Strickland*. To show that counsel's assistance was "so defective as to require reversal of a conviction or death sentence," the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

First, when a defendant argues that counsel's performance was deficient, he "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 104 S. Ct. at 2064. The proper measure of attorney performance is "reasonableness under prevailing professional norms." *Id.*, 104 S. Ct. at 2065. The

Supreme Court further explained the standard by which we are to judge counsel's performance:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence, and it is all to easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. 689, 104 S. Ct. 2065.

Regarding Radolovich's decision not to investigate Slaughter's social history, we found that Radolovich's decision was reasonable under the circumstances. *See supra* Issue I.

Regarding the issues of funding and further mental examinations, we also conclude that it was reasonable for Radolovich to decide not to pursue funding or further

evaluations. A careful reading of Dr. Johnson's report finding Slaughter competent to stand trial reveals that the information contained in Dr. Johnson's report was mixed, including some information helpful to Slaughter's case, and some that was not particularly helpful. Based on Dr. Johnson's report, Radolovich could have reasonably determined that further evaluations could not assist Slaughter, and as a matter of trial strategy, decided to forego those evaluations.

The information in the reports made in conjunction with Slaughter's RCr 11.42 motion was also mixed. These reports uncovered some mitigating evidence, but it was equivocal at best. We are not persuaded that this evidence, if presented at the original sentencing hearing, would have swayed the jury to decide against a capital sentence.

Because Radolovich's decision not to pursue further psychological examinations does not support an ineffective assistance claim, his choice regarding mental health experts was reasonable under the circumstances.

Even if counsel's performance was not reasonable, Slaughter has not proven ineffective assistance of counsel, because he has not shown prejudice, the second prong of the *Strickland* test. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694, 104 S. Ct. at 2068. In a case where the defendant received the death penalty, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S. Ct. at 2069.

The trial court conducted a three-day evidentiary hearing on the RCr 11.42 motion, at which fourteen

witnesses testified. Even after all this evidence was presented, the trial court was "not persuaded that, in 1983, the now mitigating evidence would have changed [the] jury's verdict . . . ." *See Findings and Conclusions*, No. 83CR0387, entered June 22, 1995. We agree with this assessment. The information discovered by subsequent investigation and psychological examinations sheds more light on Slaughter's upbringing and suggests he has a learning disability. However, the information also portrays Slaughter as a cooperative individual who performed very well on several of the tests administered. *See* Appendix One, Brief for Appellant at 122-25, *Slaughter v. Commonwealth*, (No. 96-SC-49-MR). The information would have presented some mitigating factors, but we are not convinced that they would have overcome the aggravating factors presented by the Commonwealth. Because Slaughter has not demonstrated prejudice, he has not shown ineffective assistance of counsel as set forth in *Strickland*.

III. FAILURE TO REQUEST A CRIMINAL FACILITATION INSTRUCTION

Slaughter also argues that Radolovich provided ineffective assistance because he did not request a jury instruction on criminal facilitation. This issue was presented on direct appeal. Brief for Appellant at 62, *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407 (1987) (No. 84-SC-272-MR).

RCr 11.42 does not permit a convicted defendant to retry issues which either could and should have been raised in the original proceeding or were raised in the trial court and considered by the [Supreme Court] on appeal. *Thacker v. Commonwealth*, Ky., 476 S.W.2d 838 (1972). The issue of a criminal facilitation instruction was presented to this Court in the direct appeal, and the Court noted that it had carefully considered all issues presented, but only discussed issues

having merit. *Slaughter*, 744 S.W.2d at 409. Therefore, this issue is not appropriate for a motion pursuant to RCr 11.42.

IV. CONFLICT OF INTEREST

Fourth, Slaughter argues that Radolovich had a conflict of interest as defined in SCR 1.7.

The information provided by Slaughter regarding the alleged conflict of interest is not sufficient to make a determination under SCR 1.7. In seeking postconviction relief, the movant must set out the facts with sufficient specificity to generate a basis for relief. *Lucas v. Commonwealth*, Ky., 465 S.W.2d 267 (1971). Because Slaughter has not adequately stated a basis for a conflict of interest, he cannot be afforded relief under RCr 11.42.

V. FAILURE TO REQUEST A COMPETENCY HEARING

Fifth, Slaughter alleges that Radolovich provided ineffective assistance because he did not request a competency hearing. The issue of competency was addressed at length in Slaughter's original brief to this Court. Brief for Appellant at 68, *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407 (1987) (No. 84-SC-272-MR). As mentioned previously, the Court carefully considered all issues presented in Slaughter's direct appeal, but the published opinion included only issues having merit, as determined by the Court. Because the Court carefully considered the issue of competency and then determined that the issue was without merit, Slaughter cannot be afforded relief under RCr 11.42.

VI. PERJURED TESTIMONY

Next, Slaughter argues that the prosecution used perjured testimony to obtain his convictions. A defendant may not bring a motion under RCr 11.42 relating to the use

of perjured testimony unless "his allegation is supported by particulars showing the alleged perjury in detail, and the sources of the Government's alleged knowledge." *King v. Commonwealth*, Ky., 387 S.W.2d 582, 584 (1965).

Slaughter points out the testimony in question, but he has not shown that the prosecution was aware of the perjury. He has not met the standard outlined in *King* and, therefore, we cannot grant relief under RCr 11.42.

VII. POLICE DESTRUCTION OF EVIDENCE

Slaughter also asserts that the police destroyed crucial evidence by erasing a taped statement from the witness who allegedly perjured himself. However, during trial, Detective George Barrett testified that the tape was inadvertently erased by a transcriptionist.

The United States Supreme Court has held that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. *Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988). Because the trial record indicates that the taped was inadvertently erased, Slaughter has not shown bad faith on the part of the police.

VIII. VOIR DIRE

Slaughter next asserts that he received ineffective assistance of counsel during voir dire.

First, Slaughter argues that he received ineffective assistance of counsel because Radolovich did not attempt to rehabilitate eight potential jurors who were excused because of their views on the death penalty. This issue was addressed by this Court on direct appeal. Brief for Appellant at 101-04, *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407 (1987)

(No. 84-SC-272-MR). Therefore, it is not appropriate for an RCr 11.42 motion. *See supra* Issue III.

Second, Slaughter argues that Radolovich provided ineffective assistance because he did not ask questions of potential jurors regarding race. An RCr 11.42 motion is not a substitute for a direct appeal. *See King*, 387 S.W.2d at 584; *Thacker*, 476 S.W.2d at 839. The issue of potential jurors' racial bias could have and should have been addressed on direct appeal. Consequently, it is not appropriate for an RCr 11.42 motion.

Third, Slaughter argues that Radolovich should have asked questions regarding pretrial publicity. However, whether prejudicial publicity preceded or surrounded the trial is not an appropriate issue for an RCr 11.42 motion. *King*, 387 S.W.2d at 584.

Finally, Slaughter asserts that Radolovich should have questioned five potential jurors who had already heard cases during the current term of jury service. This, too, is an issue that is inappropriate for an RCR 11.42 motion because it could have and should have been raised at trial. *Thacker*, 476 S.W.2d at 839.

IX. FAILURE TO OBJECT TO EVIDENCE

Slaughter also claims Radolovich provided ineffective assistance because he failed to object to evidence presented at trial.

First, Slaughter argues that Radolovich should have objected to statements about Slaughter's prior bad acts. This issue was presented on Slaughter's direct appeal to this Court. Brief for Appellant at 53, *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407 (1987) (No. 84-SC-272-MR). Therefore, it is not appropriate for an RCr 11.42 motion. *King*, 387 S.W.2d at 584.

Second, Slaughter argues Radolovich should have objected to testimony by a police officer that he was suspicious of Slaughter. This, too, was presented on direct appeal. Brief for Appellant at 49, *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407 (1987) (No. 84-SC-272-MR). Accordingly, it is also inappropriate for an RCr 11.42 motion. *King*, 387 S.W.2d at 584.

Finally, Slaughter asserts that Radolovich should have objected to the introduction of seven photographs of the victim. This issue could have and should have been presented on direct appeal and, therefore, is not appropriate for an RCr 11.42 motion. *Thacker*, 476 S.W.2d at 839.

X. FAILURE TO REQUEST INSTRUCTION ON NON-STATUTORY MITIGATION

Slaughter also asserts that Radolovich provided ineffective assistance because he failed to request a jury instruction on non-statutory mitigating factors. This issue was presented on direct appeal. Brief for Appellant at 107, *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407 (1987) (No. 84-SC-272-MR). Thus, it is not appropriate for an RCr 11.42 motion. *King*, 387 S.W.2d at 584.

XI. REPORT OF THE TRIAL JUDGE

Slaughter also asserts that he was denied a meaningful opportunity to present mitigating evidence because the trial judge prepared his report before the sentencing hearing. This issue was presented on direct appeal. Brief for Appellant at 133, *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407 (1987) (No. 84-SC-272-MR). Therefore, is not appropriate for an RCr 11.42 motion. *King*, 387 S.W.2d at 584.

XII. JUROR'S QUESTION TO SLAUGHTER DURING SENTENCING PHASE

Next, Slaughter argues that the trial court improperly allowed a juror to question him during the sentencing phase. This issue was presented and reviewed by the Court on direct appeal. *Slaughter*, 744 S.W.2d at 413-14. Therefore, it is not appropriate an RCr 11.42 motion. *King*, 387 S.W.2d at 584.

XIII. SLAUGHTER'S STATEMENT TO POLICE WAS COERCED

Slaughter also asserts that the statement he made to police was coerced. The issue of an involuntary confession is not appropriate for an RCr 11.42 motion, so we cannot grant Slaughter postconviction relief on this issue. *Id.*

XIV. TRIAL COUNSEL DID NOT SEEK CO-COUNSEL

Slaughter next asserts that he was denied adequate representation because Radolovich did not seek the assistance of co-counsel. This is an issue which could have and should have been presented on direct appeal, so it is not appropriate for an RCr 11.42 motion. *Thacker*, 476 S.W.2d at 839.

XV. PENALTY PHASE JURY INSTRUCTIONS -- UNANIMOUS VERDICT

Slaughter also argues that the court improperly instructed the jury on the requirement of a unanimous verdict during the penalty phase. This issue was presented on direct appeal. Brief for Appellant at 114, *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407 (1987) (No. 84-SC-272-MR). Therefore, it is not appropriate for an RCr 11.42 motion. *King*, 387 S.W.2d at 584.

XVI. PENALTY PHASE JURY INSTRUCTIONS AND THE WORD "RECOMMEND"

Slaughter next argues that the trial court's instructions the jury during the penalty phase improperly characterized the jury's role by stating that the jury would "recommend" a death sentence. This issue was presented on direct appeal. Brief for Appellant at 137, *Slaughter v. Commonwealth*, Ky., 744 S.W.2d 407 (1987) (No. 84-SC-272-MR). Consequently, is it not appropriate for an RCr 11.42 motion. *King*, 387 S.W.2d at 584.

XVII. VICTIM IMPACT STATEMENT

Finally, Slaughter argues that the trial court erred in allowing the introduction of a victim impact statement from the victim's husband. This issue could have and should have been raised on direct appeal, so it is not appropriate for an RCr 11.42 motion. *Thacker*, 476 S.W.2d at 839.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

Lambert, C.J.; Cooper, Graves, Johnstone, Stephens and Wintersheimer, JJ., concur. Stumbo, J., dissents by separate opinion.

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RENDERED: APRIL 22, 1999
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
96-SC-49-MR

JAMES EARL SLAUGHTER APPELLANT

V.

COMMONWEALTH OF KENTUCKY APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE EARL O'BANNON, JR., JUDGE

83-CR-387

DISSENTING OPINION BY JUSTICE STUMBO

Respectfully, I must dissent from that portion of the majority opinion which affirms the trial court's denial of RCr 11.42 relief based on Appellant's claims of ineffective assistance of counsel.

As the majority properly noted, in order to show he has been denied effective assistance of counsel, Appellant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This requires a showing that 1) trial counsel's performance was deficient, and 2) the deficient performance prejudiced the defense. Because a defendant has the burden of proving both trial counsel error and resulting prejudice, a court need not examine both prongs of the *Strickland* test. *Id.*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. Nor does it matter which prong the Court examines first. If the court concludes that one prong has not been satisfied, there is no need to inquire into the other prong.

Here, the trial court left unanswered the question of whether Appellant had met his burden of proving the first prong of the *Strickland* test. As the following passage from the trial court order shows, the court merely raised the question of effective assistance, but did not resolve it:

> Without assistance from his client, and based upon the alleged, and sparse discovery, was Mr. Radolovich derelict in not discovering and not following up on, the information that a decade later the Public Advocate has been able to glean? . . . [D]id he vigorously pursue a defense for the Defendant in both phases of the trial?

Rather than definitively resolving this issue, the trial court instead relied upon the second prong of the *Strickland* test to conclude that Appellant was not entitled to RCr 11.42 relief. In so doing, the court held, "In conclusion the Court is not persuaded that the contentions of 'ineffective assistance of counsel' warrant a further conclusion that the jury would have returned a different penalty verdict."

It was entirely appropriate for the trial court to decline to resolve the question of whether the first prong of *Strickland* was satisfied due to its conclusion that the prejudice prong was not satisfied. Unfortunately, I believe the trial court erred in its analysis of the prejudice issue by holding Appellant to a higher standard of proof than is called for under *Strickland*.

Under *Strickland*, "a defendant need not show that [trial] counsel's deficient conduct more likely than not altered the outcome in the case." *Id.*, 466 U.S. at 693, 104 S. Ct. 2068, 80 L. Ed. 2d at 697. Instead, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, 466 U.S. at 694, 104 S. Ct. 2068, 80 L. Ed. 2d at 698. A reasonable probability carries a lower burden of proof than does the preponderance of the evidence standard. *See Bouchillon v. Collins*, 907 F. 2d 589, 595 (5th Cir. 1990).

In its order, the trial court stated it was "not persuaded that [Appellant's] contentions . . . warrant a further conclusion that the jury *would have* returned a different penalty verdict." (Emphasis added). It seems clear from this language that the trial court applied a more-likely-than-not, or, a preponderance standard to determine whether Appellant had been prejudiced by the alleged errors of his trial counsel. In addition to the trial court's holding, other statements made by the trial court support this conclusion. For example, the trial court framed the issue before it as whether, "had 'better' representation been made, *would there have been a different result*, or, is it mere speculation." (Emphasis added). Later, after speculating whether the standards for effective assistance of counsel in death penalty cases have been raised since the case at bar was tried, the trial court stated, "Further, even raising the standard, the Court is not persuaded that, in 1983, the now [new?] mitigating evidence would have changed that jury's *verdict; it may have, or not*, but searching the corners of this judge's mind, there is the conclusion that the contention is based upon speculation." (Emphasis added).

Based on the above-quoted language, it seems inescapable that the trial court held Appellant to a more-likely-than-not burden of proof to show prejudice. Instead, the trial court should only have held Appellant to the reasonable probability standard of proof.

The conscientious trial judge clearly struggled with this case. His ruling appears to have been a close call.

Appellant presented an abundance of mitigating evidence at the RCr 11.42 hearing which painted a strikingly different portrait of Appellant than the one heard by the jury during the sentencing phase of his trial. In fact, the trial court stated that this unheard mitigating evidence was "impressive," and noted that it had "never been presented . . . with such an accumulation of 'mitigating' evidence during [the] penalty phase [of a capital trial]." If the trial judge had applied the proper, lesser standard of proof in this case, his resolution of the issue may well have been different. Therefore, I would remand the case to the trial court for reconsideration of Appellant's RCr 11.42 motion using the "reasonable probability" test in determining whether trial counsel's performance prejudiced the defense.

Lastly, I would note that although the trial court never definitively determined whether trial counsel's performance was deficient, the majority opinion concludes that attorney Radolovich's decision not to investigate and present mitigating

evidence was reasonable under the circumstances. I believe this holding invades the province of the trial court to first address the substantive issues before it, and usurps both the function and discretion of the lower court. Thus, I would decline to address the issue of the adequacy of counsel's performance, and instead would leave that determination for the trial court to make, if necessary, upon remand for reconsideration of Appellant's claim of prejudice using the proper standard of proof.

Appendix D

NO. 83CR0387 JEFFERSON CIRCUIT COURT
DIVISION FIVE (5)

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS.

JAMES EARL SLAUGHTER DEFENDANT

FINDINGS AND CONCLUSIONS

*** *** ***

After jury trial and Judgment in 1983, this court imposed sentence of Death on the Murder charge and Twenty (20) years on Robbery.

The case was affirmed by the Supreme Court.

Years later Defendant filed a CR 11.42 Motion, which is now before the Court. The motion languished and the Court called for conference in 1992 to hone the issues. Supplemental motions were filed, and in any event an evidentiary hearing did not take place until the Court ordered the case to proceed in March 1994, and in September 1994 conducted a three day hearing.

At the hearing the Court heard testimony from Hon. Fred Radolovich, Defendant's trial attorney; Mary Moon, the Defendant's mother; Bobby Moon and Vincent Moon, Defendant's brothers; Charles Leonard and Clara Leonard, Defendant's grandparents; Dr. Eric Engum, clinical neuro psychologist; Dr. Gary Carl, family practitioner; Dr. Vivian Spears, psychologist; Lace Feldcamp, clinical social worker; Frances Peterson, an acquaintance of Defendant; Dr. Eric

Drogan, psychologist; William Keller, a Commonwealth witness at trial, who asserted Fifth Amendment privilege; Hon. Bette Niemi, a former Public Advocate attorney and now an attorney for the local Public Defender.

After the hearing the post trial memorandums attempted to hone the issues. Many were adjudicated by the direct appeal. Others may have been inserted in the memorandum (e.g., that the trial court "considered" victim impact statements before sentencing; this was not presented at the hearing, and the Court has no memory one way or the other, much less, if true may have affected the disposition).

During the pendency of this proceeding the Commonwealth objected to any "expert" testimony. The Court reversed a decision to allow the cost of such expert to be assessed against the Commonwealth. However, given the nature of the case, the Court allowed, and considered, Ms. Niemi's testimony. This will be another issue for the appellate court to consider. However, for purpose of a review, this Court can find Ms. Niemi an "expert" in capital cases, based upon personal experience and reputation. The Court notes the Commonwealth's memorandum, that despite expertise, even Ms. Niemi has not always been successful in persuading a jury against the death penalty.

With or without expert testimony, the question still remains, had "better" representation been made, would there have been a different result, or, is it mere speculation.

It is clear that the salient direction of the motion is "ineffective assistance of counsel".

Mr. Radolovich filed an affidavit in support of the motion, and at the hearing gave testimony that most his efforts were directed to the guilt-innocence phase of the trial.

Now his performance has been challenged from voir-dire to verdict.

However, the hearing was concentrated toward Mr. Radolovich's "ineffectiveness" during the "sentencing phase" of the trial.

At the time of the trial the Court and jury (and Mr. Radolovich) were told that Defendant's parents were deceased, that he had only a stepbrother sibling, that he had a troubled background, and from the testimony of Dr. Johnson, evidence that both favored and hurt the Defendant (e.g., Defendant was "anti-social").

At the hearing we now learn that the Defendant has a live mother, siblings, and grandparents. The grandparents live in Louisville. The evidence revealed an impressive display of "mitigating" evidence.

After the hearing and memorandums the Commonwealth (presumably upon the advice of Defendant's counsel?) filed with Court a pleading styled "Notice to the Court". This pleading is accompanied by an affidavit of an Assistant District Attorney in New York. This affidavit states that from the time that Mr. Radolovich was employed (May 1977-March 1978), no cases were prosecuted as capital cases, and further it was unlikely that he tried any homicide cases.

Upon receiving this information the Court, by letter of November 1, 1994, Mr. Radolovich was invited to make a response to be a part of the record in this case.

Since this issue has been raised the Court has reviewed the video of the proceedings. On direct examination Mr. Radolovich testified that he had prosecuted four capital cases in New York; and two prior as defense counsel in Kentucky. On cross examination he testified that

he began practice in 1974 in Kentucky. In 1977 he was an assistant prosecutor in New York and prosecuted four capital cases. He sat as second chair in related cases prosecuting organized crime. He returned to Kentucky, in 1980, and by the time of this trial had defended three other (non-capital) homicide cases. Between direct and cross examination it is not clear whether the two defense capital cases occurred in New York or Kentucky. However, during both examinations he testified that he prosecuted four capital cases in New York.

This testimony is in the record, and will inevitably be reviewed by an appellate court. The Court wrestled with the question as to whether or not this apparent discrepancy affects the merits of the present motion.

Mr. Radolovich's testimony placed him on a tightrope, that is loyalty to his former client and yet defending his actions in representing Mr. Slaughter.

In 1983 Mr. Radolovich did not proffer his credentials to try a capital case. The Court made no such inquiry. In 1983, or in 1995, was, or is there now, such a duty imposed upon Counsel and/or Court? In any event, for the purpose of this motion, the Court must view the motion from a perspective that counsel's capital case experience is undetermined. The Court concludes that for this motion any discrepancy in Mr. Radolovich's testimony must be put aside, and concentration be focused on the other issues.

The Court will not attempt to summarize the now presented "mitigating" evidence. As noted it was impressive. Indeed in the years following, the Court has never been presented at trial with such an accumulation of "mitigating" evidence during a penalty phase. With such evidence, presented as the standard for "effective assistance" of

counsel, Mr. Radolovich, serving pro bono, and most employed attorneys, would likely fail.

In this case the Court reiterates that, for whatever reasons, the trial attorney, relying on the client, was not privy to the Defendant's social history.

Without assistance from his client, and based upon the alleged, and sparse discovery, was Mr. Radolovich derelict in not discovering and not following up on, the information that a decade later the Public Advocate has been able to glean? Despite Mr. Radolovich's "client serving" affidavit and testimony, did he vigorously pursue a defense for the Defendant in both phases of the trial?

This case was tried in the early years after the death penalty returned. Since that time perhaps standards for effective assistance of counsel have been raised. But, in the context of 1983, this Court, also the trial judge, is not persuaded that Mr. Radolovich provided "ineffective assistance of counsel". Further, even raising the standard, the Court is not persuaded that, in 1983, that the now mitigating evidence would have changed that jury's verdict; it may have, or not, but searching the corners of this judge's mind, there is the conclusion that the contention is based upon speculation.

After a decade, perhaps, death penalty standard of counsel has been increased. Thus this Court's difficult decision is more difficult. In 1983 a jury found the Defendant guilty of a *brutal* murder, along with the statutory aggravating factor. This judge endorsed the verdict, and the case was affirmed by the Supreme Court.

Perhaps what this controversy is all about is the death penalty, and/or, disproportionate death penalty results. An easy statement, but any appellate reviewer with trial experience will understand. Since 1983 this Court has seen

juries wrestle with the death decision, and yet, during this Judge's nineteen year plus tenure, this is the only case in which a jury returned the ultimate verdict. In 1988 Justice Leibson's dissenting opinion put into question that Court's review of disproportionate death sentences.

This Opinion attempts to make a conclusion without regard to moral, practical, and disproportionate death penalty sentences. Again, an easy statement, but this case will provide the appellate reviewers an opportunity to delve within the law and self.

In conclusion the Court is not persuaded that the contentions of "ineffective assistance of counsel" warrant a further conclusion that the jury would have returned a different penalty verdict.

ORDER

IT IS ORDERED that Defendant's CR 11.42 Motion be DENIED.

This is a Final and Appealable Order and there is no just cause for delay.

/s/
EARL O'BANNON, JUDGE
June 22, 1995

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Appendix E

Supreme Court of Kentucky

James Earl SLAUGHTER a/k/a James Earl Slawter,
Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.
No. 84-SC-272-MR.

Nov. 5, 1987.
Rehearing Denied March 3, 1988

STEPHENS, Chief Justice.

James Earl Slaughter was convicted in the Jefferson Circuit Court of first-degree robbery and murder. He received a sentence of 20 years for robbery and was sentenced to death for the murder. This matter of right appeal results. We affirm.

The charges underlying the convictions arose from the death of a store owner, Esther H. Stewart, in Jefferson County on January 28, 1983. Following an investigation, Slaughter was arrested on the day after the crime. He voluntarily gave a statement to the police in which he claimed to have been acting as a "lookout" when another man, known only to appellant as "Red," killed Stewart. Slaughter, who is black, told police that he had picked up a white, male hitchhicker ("Red") and agreed to help him rob a local store.

In preparation for the robbery, the two men supposedly exchanged clothes and shoes. Slaughter stated he loaned his gun to "Red" because the small knife "Red" carried was inadequate. According to his statement, Slaughter waited

outside the store. He heard a scream, "Red" ran out of the store and the two men ran from the scene. After re-exchanging clothes, appellant drove "Red" to a local arcade and never saw him again.

The police investigators at the scene discovered a single, undischarged bullet on the floor near the victim. This bullet was later matched with the appellant's gun. The cash register was opened with difficulty, and the victim's wallet was sticking out of her purse. Police detectives questioned the owner and patrons of the arcade but were unable to locate or identify the man called "Red."

Trial began on October 24, 1983. Commonwealth witnesses testified to seeing a man run from the store. This man was identified alternatively as a white man, a black man, or by his clothes, a blue jacket and blue pants. Slaughter's housemates testified that on the night of the robbery, he was wearing a blue jacket and pants. His clothes were discovered the next morning and were stained with blood. Slaughter had left the apartment carrying his gun. A butcher knife, not used in preparing the evening meal, was found in the dish rack in the morning.

At least three witnesses heard and repeated Slaughter's admission to his involvement in the crime. Their version was that Slaughter related that his intention was to rob the store. When he asked the woman for money she screamed. He hit her with his gun and then stabbed her to stop the screaming.

The doctor who performed the autopsy stated the victim's death was due to a stab wound. Other injuries included multiple stab wounds and a blow to the head.

The jury found Slaughter guilty of murder and robbery

during the guilt phase of the trial. During the penalty phase the jury recommended death due to the aggravating circumstance of the murder having been committed during the course of a robbery.

The facts will be discussed in more detail as specific issues are reviewed. Appellant raised 29 issues on appeal. Although we have carefully considered all of them, only certain ones will be discussed in this opinion. All others are without merit.

With respect to the guilt phase of the trial, we will consider the following contentions of appellant: (1) whether there was sufficient independent corroborative evidence (other than evidence of appellant's confessions) presented to sustain the conviction of robbery; (2) whether the trial judge committed reversible error in failing to excuse for cause a prospective juror who may have doubted her own partiality; (3) whether the closing argument of the prosecutor constituted reversible error; and (4) whether the trial court erred in failing to instruct the jury on wanton murder and second degree manslaughter.

With respect to the sentencing phase of the trial, we will consider four issues: (1) whether reversible error was committed by the trial court's permitting a juror to question the appellant; (2) whether the trial court erred in failing to make a finding whether the evidence was sufficient to foreclose all doubt of guilt; (3) whether certain conduct of the prosecutor was of such a nature as to deprive appellant of a fair trial; and (4) whether appellant's sentence of death is disproportionate to other recent Kentucky death penalty cases.

WAS THERE SUFFICIENT CORROBORATIVE EVIDENCE, OTHER THAN THE EVIDENCE OF APPELLANT'S CONFESSIONS, TO SUSTAIN THE CONVICTION OF ROBBERY?

The basis of this argument is RCr 9.60, which is as follows: "Corroboration of confession.-A confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied by other proof that such offense was committed."

The corroborative evidence required addresses itself as to whether the *crime* charged was committed and *not as to whether* the particular defendant committed it. *Taylor v. Commonwealth,* Ky., 461 S.W.2d 920 (1970), cert. denied, *Brown v. Kentucky,* 404 U.S. 837, 92 S. Ct. 126, 30 L. Ed. 2d 70 (1971); *Wilson v. Commonwealth,* Ky., 476 S.W.2d 622 (1971). Such proof, very simply, must be independent of any out-of-court confession, and must show that the charged crime was, in fact, committed. Once such evidence is present, guilt of the defendant may be proven by the evidence of the confession(s). *Dolan v. Commonwealth,* Ky., 468 S.W.2d 277 (1971). The rule, in its effect, requires that the *corpus delicti* of the crime be proven by independent, corroborative evidence.

Thus, we examine the record to see if there is, in fact, evidence other than the out-of-court admissions of appellant that first-degree robbery was actually committed. This question (and its answer) takes on special significance in that the commission of the murder during the course of the robbery was the only aggravating circumstance that would have justified the imposition of the death penalty. KRS 532.025(2)(a)2. If there was no compliance with the mandate of RCr 9.60, the death sentence, in this case, would

have to be reversed.

Specifically, therefore, we determine if the independent evidence in the record shows that the statutory elements of robbery in the first degree are present. That crime is defined in KRS 515.020:

> "(1) A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
>
> > "(a) Causes physical injury to any person who is not a participant in the crime; or
> > "(b) Is armed with a deadly weapon; or
> > "(c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime."

The two basic elements necessary to prove this crime are the *intent to commit a theft* and either the causing of a physical injury, the presence of a deadly weapon or the threat of use of a dangerous instrument. It is crystal clear, and is not contested by appellant, that the owner and operator of the store was killed by various blows and by multiple stab wounds. The medical examiner's testimony, plus others', prove that element of the crime.

Appellant concentrates his argument on the purported lack of evidence to sustain the other element of the crime, *viz,* whether there was independent evidence to show an intent to commit a theft. We believe that there is an abundance of evidence to show that James Earl Slaughter had the requisite intent to commit theft. A witness testified that Slaughter had

been in the store several days before the crime and was loitering and acting suspiciously. He was, in effect, "casing" the store. It was also shown that the cash register in the store was open, slightly, when an investigating officer entered the store and took a photograph of it. Also, it was testified to that the same cash register was broken. The clear implication is that the cash register was attempted to be opened by the killer, and in so doing, it was broken. A drawer, under the cabinet on which the cash register was located was wide open when the police came into the store. It is reasonable to assume that the killer was rummaging about near the cash register, looking for money.

Also, the decedent's purse was empty of money when police found it behind the drawer underneath the cabinet holding the cash register. The purse, moreover, was open, and the wallet inside the purse was partially out of the purse. This is further indication that the killer was searching for money.

The killer of Mrs. Stewart was in the store, armed with a gun and a knife. The purpose of such presence was clearly to rob her. His previous scouting of the store, the attempt to open the cash register, the opening of the drawer, and the opening of the purse clearly are evidence of such nature as to show a clear intent to commit a theft. A jury would be totally justified in so believing. *Trowel v. Commonwealth,* Ky., 550 S.W.2d 530 (1977). In *Bailey v. Commonwealth,* Ky., 502 S.W.2d 48 (1974), we held that the fact that the victim had a wallet on his person during the day he was shot, and that it was missing when his body was discovered, was sufficient independent evidence to corroborate a confession of armed assault with intent to rob. The evidence present here is stronger than that present in *Bailey,* and we find that RCr 9.60 was complied with.

We, therefore, decline to dismiss the robbery charge and, *a fortiori,* to reverse the imposition of the death penalty for this reason.

DID THE TRIAL JUDGE COMMIT REVERSIBLE ERROR IN FAILING TO DISCHARGE, FOR CAUSE, JUROR GRAF?

During individual voir dire concerning juror attitudes about the death penalty, Graf volunteered the information that she had previously been a victim of a break-in at her home. She asked, "Does this have to do with a break-in type robbery?" When the court asked her to elaborate, she stated, "My home was robbed twice and I saw the party and I don't think I could be very impartial in...." The prosecutor explained that this was the robbery of a store, and Graf stated that she "... probably wouldn't have any...." Before she could finish her answer, appellant's counsel interrupted her. She then stated: "I was frightened so badly because I found them in my home and I just ... I just would't want to be involved with anything like that. *But this break-in, I could make that general and I probably could be impartial.*" (Emphasis added.)

The trial court reserved his ruling on a challenge for cause, and specifically invited defense counsel to inquire further. He failed to do so.

In determining whether a juror should have been stricken for cause, we have declared that such determination lies within the sound discretion of the trial judge, and his ruling will not be disturbed unless his action was clearly erroneous. *Caldwell v. Commonwealth,* Ky., 634 S.W.2d 405, 407 (1982). It is clear that the trial court felt that Graf could be fair and impartial, and in fact, had been "rehabilitated" by her subsequent questions and answers in individual voir dire.

Clearly there is no abuse of discretion here.

DID THE CLOSING ARGUMENT OF THE PROSECUTOR CONSTITUTE REVERSIBLE ERROR?

In any consideration of alleged prosecutorial misconduct, particularly, as here, when the conduct occurred during closing argument, we must determine whether the conduct was of such an "egregious" nature as to deny the accused his constitutional right of due process of law. *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). The required analysis, by an appellate court, must focus on the overall fairness of the trial, and not the culpability of the prosecutor. *Smith v. Phillips,* 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982).

In his final summation, the prosecutor noted that what defense counsel said is not evidence in the case. He criticized the defense counsel for presenting a "great octopus" defense. He accused counsel of pulling a "scam," and he questioned the sharpness of counsel. Great leeway is allowed to *both* counsel in a closing argument. It is just that- *an argument.* A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position. We find that the remarks referred to here were well within the proper bounds of a closing argument and certainly did not affect the outcome of the trial. See *Hunt v. Commonwealth,* Ky., 466 S.W.2d 957 (1971); *Houston v. Commonwealth,* Ky. App., 641 S.W.2d 42 (1982); and *Johnson v. Commonwealth,* Ky., 302 S.W.2d 585 (1957).

Appellant urges that the prosecutor coerced the jury to reach a verdict of guilty. He stated to the jury that he had done all

he could do, that the police had done all they could do, that the judge had been fair and impartial, and "... now it's going to come your time to deal with justice in this particular case." This argument of appellant is little short of being specious. A prosecutor can ask the jury not to "let the officer down." *Johnson v. Commonwealth,* Ky., 446 S.W.2d 561 (1969). A prosecutor may call on the jury to do its duty. *McPeak v. Commonwealth,* 308 Ky. 29, 213 S.W.2d 447 (1948). A prosecutor may tell a jury that one way to stop murder is "for all of us to do our job...." *Wallen v. Commonwealth,* Ky., 657 S.W.2d 232 (1983). Under the parameters of these cases, it is obvious that the statement was proper.

Appellant also complains that the prosecutor expressed his personal opinion of the defendant's guilt. Such comment is admissible as long as that opinion is based on evidence in the case. *Koonce v. Commonwealth,* Ky., 452 S.W.2d 822 (1970).

Lastly, complaint is made that the prosecutor made reference to defendant as a "bit of evil." We have held it permissible to refer to a defendant as a "beast," *Koonce, supra,* and as a "desperado," *Holbrook v. Commonwealth,* 249 Ky. 795, 61 S.W.2d 644 (1933). It has also been held proper to describe a particular defendant as being worse than all the convicts and traitors in hell. *Cook v. Bordenkircher,* 602 F.2d 117 (6th Cir. 1979). A "bit of evil" is certainly less offensive than the sobriquets applied in those cases.

We find no error in any of the arguments made by the prosecutor in his closing argument.

DID THE TRIAL COURT ERR WHEN IT FAILED TO INSTRUCT THE JURY ON WANTON MURDER AND SECOND DEGREE MANSLAUGHTER?

Appellant contends that he was entitled to an instruction on second-degree manslaughter. KRS 507.040 provides:

> Manslaughter in the second degree.-(1) A person is guilty of manslaughter in the second degree when, including, but not limited to, the operation of a motor vehicle, he wantonly causes the death of another person.

Further, "wanton" has been defined as: "Wantonly"-A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

Appellant maintains that an instruction on wanton murder was mandated based upon his alleged participation in the robbery as a look-out, during which the victim was murdered.

We disagree. The jury must be instructed according to the evidence. *Sanders v. Commonwealth*, Ky., 685 S.W.2d 557 (1985). In the case at bar, there was no evidence of intent whatsoever. Indeed, appellant argued at trial that an unidentified other man actually committed the robbery-murder. The jury was unconvinced. We have consistently

held that when the evidence is such that a reasonable jury could convict the defendant of a lesser offense, an instruction on that offense is necessary. *Smith v. Commonwealth,* Ky., 737 S.W.2d 683 (1987), *Commonwealth v. Rose,* Ky., 725 S.W.2d 588 (1987), *Baker v. Commonwealth,* Ky., 677 S.W.2d 876 (1984). However, an instruction on wanton murder was not appropriate here, because there was no evidence of intent presented whatsoever, and no reasonable jury could conclude that appellant consciously disregarded an unjustifiable risk he denied ever taking.

WAS IT REVERSIBLE ERROR FOR THE TRIAL COURT TO PERMIT A JUROR TO QUESTION THE DEFENDANT?

Whereas appellant did not take the witness stand during the guilt phase of the trial, he did so during the penalty phase. Following his direct examination, a juror questioned him as follows:

> "Juror No. 5: I have a question. He stated that he knew, he and this Red had been friends for sometime. Where did this Red live [?] He would had to visit or something. Where did this Red live? Where did he hangout at? Why didn't any of your friends know about you and Red and since you ..."The Court: That is about five questions there. I'll allow the questions. But there was about four there. "Witness [Appellant]: Um, I would say this much. He stays on Hill Street. I won't say what part or what but he stays on Hill Street. "Juror No. 5: You are asking for your life and nobody can find Red and you refuse. Why do you refuse to tell his address so he can be found to save you probably? "Witness: I ..."Mr. Radolovich: May we approach the bench."

Appellant argues that the questions of the juror show a predisposition against him. He argues that the trial court should have screened the questions prior to permitting them to be asked. He argues that the last question "inflamed" the jury.

In addressing this issue, we are mindful of the fact that appellant did not testify at the guilt phase, and we are mindful that the jury found him *guilty* of robbery and murder. The challenged questions occurred during the sentencing phase of the trial.

It is proper for jurors to ask questions of witnesses so long as they are pertinent and competent. *Miller v. Commonwealth,* 188 Ky. 435, 222 S.W. 96 (1920). The rationale is that questions (and answers thereto) are encouraged in the interest of justice and to enhance the understanding of the facts and issues in a case. In *Smith v. Commonwealth,* 140 Ky. 599, 131 S.W. 499 (1910), a juror was permitted to ask a defendant why he was carrying a pistol at the time he shot and killed the victim. We said that the questions, "were both pertinent and proper for the purpose of developing and showing that in carrying the pistol ... [the defendant] did so with the expectation that he might and would meet the deceased, and, if he did, shoot him." *Id.* at 501.

What was the purpose of the question? Certainly it was to determine if "Red" really existed, or if he was only a phantom created by appellant to absolve him of the crime. It is a question that probably would have been extensively discussed in the jury room. It is a legitimate question. A prosecutor may properly comment on the defendant's failure to introduce witnesses on a defensive matter. *Francis v. Commonwealth,* 311 Ky. 318, 224 S.W.2d 163 (1949). The gravamen of the question is the credibility of the witness.

We find no error here.

Appellant also points out that Kentucky has no procedure for questioning by a juror, *e.g.*, some courts require questions to be submitted in writing. We believe that any such procedure is not required. The jury-of all people-has the right to have questions-proper questions-answered. Such can only further their duty, their purpose, their *raison d'etre,* to search out the truth. We believe that the presiding judge can protect the rights of all parties by simply ruling on the competency of the questions, in the identical manner that he does in the course of the trial.

DID THE TRIAL COURT ERR IN FAILING TO MAKE A FINDING THAT THE EVIDENCE WAS SUFFICIENT TO FORECLOSE ALL DOUBT OF GUILT?

KRS 532.075(1) provides that whenever the death penalty is imposed for a capital offense, the trial judge must prepare a report "in the form of a standard questionnaire prepared and supplied by the Supreme Court." Question 11 on the standard questionnaire prepared and supplied by this Court requires the trial judge to answer the following question:

> "Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt?" The trial judge in the case at bar did not answer this question; he instead responded that it was an "inappropriate question."

Appellant urges that this failure is of such magnitude as to require a new penalty phase hearing and requests us to remand the case to the circuit court for such a procedure. We decline to do so.

The purpose of the statutory mandate of this procedure and filing of the written report is set out in the statute. KRS 532.075(3) is as follows:

> "(a) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
> "(b) Whether the evidence supports the jury's or judge's finding of statutory aggravating circumstances as enumerated in KRS 532.025(2), and
> "(c) Whether the sentence of death is excessive ordisproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

No specific questions are set out in the statute, that is left up to this Court. Certainly, the trial court should have answered *all* the questions. However, it is clear that he did answer all other questions and that those questions (and answers) provided all the information necessary to respond to the basic questions provided in the statute quoted above. At worst, this failure to answer the question was a technical error and in no way affected the judge's ability to impose the death penalty. Certainly, it does not affect our ability to thoroughly review the conviction.

WAS THE CONDUCT OF THE PROSECUTOR OF SUCH A NATURE AS TO DEPRIVE APPELLANT OF A FAIR TRIAL?

The challenged conduct occurred during the cross-examination of the appellant and during the closing argument.

Appellant testified that he was nineteen years old at the time

of the offense and twenty years old at the time of the trial. The trial court instructed the jury that it could consider the appellant's youth as a mitigating circumstance. KRS 532.025(2)(b)8; *Ice v. Commonwealth,* Ky., 667 S.W.2d 671, 680 (1984). In his closing argument, the prosecutor attempted to persuade the jury to reject appellant's youth as being in mitigation. He said:

> "That James Earl Slaughter was a relatively young man at the time of the offense. Well, so he's twenty. I think one of the other witnesses who had been close to him had indicated something, *if my memory serves me correctly and if I am wrong, rely upon what you heard,* said something about the fact that the man indicated he was much older." (Emphasis added.)

Appellant argues that there was no evidence that he was "much older" and that such statement is a flagrant misrepresentation of the evidence and that it is highly prejudicial when the jury was considering the appellant's youth as a mitigating factor.

Clearly, there was no attempt here to mislead the jury. The prosecutor, as shown above, carefully cautioned the jury that *his memory could be wrong.* He told them not to rely on him, but rather to rely on what *they* had heard. He also conceded that the appellant was "twenty." When the *entire statement is read,* no prejudice or misstatement is perceived.

At the penalty phase of the trial a psychologist testified that appellant had a borderline personality disorder with antisocial traits. He stated that people who have this disorder, as a group, have relatively poor prospects for improvement, but he declined to say that any single person, *e.g.,* the appellant, could not improve. In closing argument,

the prosecutor seized on this testimony and quoted the psychologist as having said that appellant's prospect for rehabilitation was very, very poor. He said:

> "Rehabilitation. I am not going to belabor or stay with that very long at all. Just take a look at the information which has been received by or from the psychologist, that under that circumstance the likelihood of rehabilitating this man is very, very poor."

Appellant argues that this argument was a flagrant misstatement of the evidence. We disagree. It is clearly a reasonable inference from the doctor's original statement, that as a *group,* the chances of improvement were very poor. The jury heard the testimony of the doctor, and regardless of the argument of counsel, (on either side of the case) they can determine the truth. There is no error here.

Appellant also objects to part of the prosecutor's closing argument in which he quotes the Bible. We have examined the argument and find that although it was improper, it was not prejudicial.

Finally, during his cross-examination of appellant, the prosecutor stated that appellant was "telling a lie now about not being the person who stabbed the lady to death." He ended his cross-examination by stating:

> "This is the classic example of what you indicated to the psychologist; you tell these people any damn thing. I have no further questions of you."

It is argued that this expresses an improper personal opinion of the prosecutor.

Appellant, under cross-examination, had previously admitted to lying to the police about "Red" leaving a knife on the seat of the car. The comment, and that is precisely what it is, a comment, acknowledges a previous lie told by appellant. The comment of the prosecutor, a parting shot at appellant, was rhetoric, based on what the jury had already heard, *viz.*, that the appellant had admittedly lied once, and arguably, would lie again. We find no error or prejudice here.

IS THE DEATH PENALTY IMPOSED AGAINST THE APPELLANT DISPROPORTIONATE?

We have carefully considered whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases and have in this regard considered the crimes committed here and all of the evidence surrounding Slaughter and his background.

The data for our use in this regard have been compiled in accordance with KRS 532.075(6)(a), (b), and (c). We have considered all of the cases in which the death penalty was imposed after January 1, 1970, as follows: *Scott v. Commonwealth,* Ky., 495 S.W.2d 800 (1972); *Leigh v. Commonwealth,* Ky., 481 S.W.2d 75 (1972); *Lenston and Scott v. Commonwealth,* Ky., 497 S.W.2d 561 (1973); *Call v. Commonwealth,* Ky., 482 S.W.2d 770 (1972); *Caldwell v. Commonwealth,* Ky., 503 S.W.2d 485 (1972); *Tinsley and Tinsley v. Commonwealth,* Ky., 495 S.W.2d 776 (1973); *Galbreath v. Commonwealth,* Ky., 492 S.W.2d 882 (1973); *Caine and McIntosh v. Commonwealth,* Ky., 491 S.W.2d 824 (1973); *Hudson v. Commonwealth,* Ky., 597 S.W.2d 610 (1980); *Meadows v. Commonwealth,* Ky., 550 S.W.2d 511 (1977); *Self v. Commonwealth,* Ky., 550 S.W.2d 509 (1977); *Boyd v. Commonwealth,* Ky., 550 S.W.2d 507 (1977); *Gall v. Commonwealth,* Ky., 607 S.W.2d 97 (1980), *McQueen v.*

Commonwealth, Ky., 669 S.W.2d 519 (1984); *White v. Commonwealth,* Ky., 671 S.W.2d 241 (1984); *Harper v. Commonwealth,* Ky., 694 S.W.2d 665 (1985); *Skaggs v. Commonwealth,* Ky., 694 S.W.2d 672 (1985); *Kordenbrock v. Commonwealth,* Ky., 700 S.W.2d 384 (1985); *Bevins v. Commonwealth,* Ky., 712 S.W.2d 932 (1986); *Matthews v. Commonwealth,* Ky., 709 S.W.2d 414 (1986); *Marlowe v. Commonwealth,* Ky., 709 S.W.2d 424 (1986); *Halvorsen and Willoughby v. Commonwealth,* Ky., 730 S.W.2d 921 (1987); *Smith v. Commonwealth,* Ky., 737 S.W.2d 683 (1987).

The cases preceding *Gall* have had the death penalty set aside for the reason the statute was invalid under *Furman v. Georgia,* 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). In making a comparative study of these cases and the circumstances in this case, we are of the opinion the sentence of death here is not excessive or disproportionate to the penalty imposed in the enumerated cases.

The judgment is affirmed.

GANT, STEPHENSON and WINTERSHEIMER, JJ., concur.
LEIBSON, J., dissents in a separate opinion.
VANCE, J., dissents in a separate opinion in which LAMBERT, J., joins.
LEIBSON, Justice, dissenting.
Respectfully, I dissent.

I am concerned whether we have properly discharged our responsibility to perform an independent proportionality review as mandated by KRS 532.075, *Review of death sentence by Supreme Court.* It is our responsibility to decide "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases,

considering both the crime and the defendant." KRS 532.075(2)(c).

This proportionality review was statutorily mandated to comply with *Furman v. Georgia,* 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) and *Gregg v. Georgia,* 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). Under more recent United States Supreme Court authority, *Pulley v. Harris,* 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984), perhaps it is no longer a Federal constitutional requirement in every case, but nevertheless it remains a statutory obligation in every case.

I have reviewed the fact situation in *all* of the death penalty cases listed in the Majority Opinion. There is no case similar to this one where the death penalty was affirmed.

Here there is no evidence of premeditation. On the contrary the evidence proves that the appellant was attempting to rob a neighborhood store, and killed in reaction to the victim's panic and scream, whereupon he aborted the robbery attempt and ran out of the store. As stated in the Majority Opinion: "... Slaughter related that his intention was to rob the store. When he asked the woman for money she screamed. He hit her with his gun and then stabbed her to stop the screaming."

The appellant was born February 3, 1963 and just turned 20 years of age when the offense occurred on January 28, 1983. The trial judge's report states the following mitigating circumstances were in evidence:

> "No significant criminal history; youth of defendant; no history (of) conviction (of) violent offenses; did not flee; can be treated and rehabilitated; low intelligence; difficult childhood."

I am persuaded by the difference in this killing and *Stanford v. Commonwealth,* Ky., 734 S.W.2d 781 (1987). Stanford robbed, raped, sodomized and murdered Baerbel Poore, the clerk at a Checker gas station in Jefferson County. The critical difference was that Stanford knew the victim before the robbery and obviously intended to leave no witness. After committing robbery and sex offenses upon her, he forced the victim to drive with him some distance to a deserted area, kneel in the backseat, smoke a last cigarette, and he then killed her with a bullet through the head, execution style. His past history showed that he had attempted a similar type of killing a short time before. If there is such a thing as two classes of murder that deserved different punishments, and the law as presently written presupposes that there is, then the line should be drawn somewhere between Stanford's case and Slaughter's case.

The structure mandated by the United States Supreme Court for deciding whether the death penalty violates Eighth Amendment protection against cruel and unusual punishments is twofold: (1) to determine whether the murderer is in the *death eligible class* and (2) then to decide if the murderer is *death qualified* by the circumstances *unique* to his case. By Kentucky statute those persons who murder in the course of a robbery are in the death eligible class. But the circumstances unique to this case do not justify the further decision that Slaughter's killing deserves the death penalty; at least not if we are trying to stop imposing the death penalty in an arbitrary manner.

Many death penalty cases have been reduced to life imprisonment on independent proportionality review by state Supreme Courts in Florida, Georgia and Texas, but none by ours. This is a case where independent review by our Court

justifies a similar conclusion.

VANCE, Justice, dissenting.

I respectfully dissent. The appellant requested an instruction on second-degree manslaughter and objected to the failure of the court to give it. I believe he was entitled to such an instruction.

Esther Stewart died from a stab wound inflicted upon her during the course of the robbery. Appellant denied that he stabbed Mrs. Stewart but admitted to police investigators that he stood outside as a lookout while another man committed the robbery. Other witnesses testified that appellant admitted to them his involvement in the crime and stated that when he asked the woman for money she screamed, and he then hit her with his gun and stabbed her to stop her from screaming.

A detective testified that appellant stated that he was in the store when the robbery occurred but that nobody was supposed to get killed.

The appellant was convicted of intentional murder. Intentional murder requires a specific intent to cause death. K.R.S. 507.020. A specific intent to cause death may be inferred from the circumstances, and the circumstances in this case were sufficient to warrant the jury to believe that appellant committed the robbery and stabbed Esther Stewart with an intent to kill her.

In view of appellant's statement that nobody was supposed to get killed and that he stabbed Mrs. Stewart to stop her from screaming, the jury might have believed that he stabbed Mrs. Stewart, but nevertheless have had a reasonable doubt as to whether or not he intended the stabbing to cause her death. If

such a doubt existed in a juror's mind, but yet there was no doubt that appellant was aware of and consciously disregarded a substantial risk that death might result from the stabbing, he could reasonably have been found guilty of second-degree manslaughter by wantonly causing the death of another person.

Because the evidence was such that the jury could have had a reasonable doubt that appellant intended to kill Mrs. Stewart, yet not have doubted that he was aware of an unjustifiable risk that his act would cause the death of Mrs. Stewart, he was entitled to an instruction on second-degree manslaughter, a lesser included offense of the offense of murder.

LAMBERT, J., joins in this dissenting opinion.

Appendix F

United States Court of Appeals
Sixth Circuit

James Earl SLAUGHTER,
Petitioner-Appellee/Cross-Appellant,
v.
Phil PARKER, Warden,
Respondent-Appellant/Cross-Appellee.
Nos. 01-6359/6464.

Filed: Nov. 1, 2006.

Before BOGGS, Chief Judge; BATCHELDER and COLE, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

R. GUY COLE, JR., Circuit Judge, with whom MARTIN, DAUGHTREY, MOORE, and CLAY, Circuit Judges, join, dissenting from the denial of rehearing en banc.

We are uneasy about executing anyone sentenced to die by a jury who knows nearly nothing about that person. But we have allowed it. We are also uneasy about executing those who commit their crime at a young age. But we have allowed that as well. We are particularly troubled about executing someone who likely suffers brain damage. We rarely, if ever, allow that—especially when the jury is not afforded the opportunity to even consider that evidence. Jeffrey Leonard, known to the jury only as "James Slaughter," approaches the execution chamber with all of these characteristics. Reaching this new chapter in our death-penalty history, the majority decision cannot be reconciled with established precedent. It certainly fails the Constitution. This Court's seven to seven stalemate regarding the en banc petition, however, leaves this precarious decision intact. Accordingly, I dissent from the denial of rehearing en banc.

I. BACKGROUND

Twenty-year-old Jeffrey Leonard was sentenced to death for the robbery and stabbing death of store owner Esther Stewart. Trial counsel's failure to investigate Leonard's background prevented him from learning even that "James Earl Slaughter" was not Leonard's real name. The district court granted "Slaughter" habeas relief because—due to trial counsel's failures—the jury never knew that Slaughter has possible brain damage from an untreated childhood skull fracture near his right frontal lobe; his cognitive disorder is likely the result of this brain injury; his mother and stepfather (Slaughter's father abandoned Slaughter's fifteen-year-old mother) beat him so badly as a child that scars remain all over his body; his stepfather once fired a gun at him as he ran out of the home carrying his younger brother; his parents locked him and his siblings in rooms without food, and he would sneak food to his younger siblings; his mother,

brothers, and grandparents (who did not know about the trial) would have testified on his behalf; and a clinical psychologist specializing in neuropsychology and forensic psychology concluded that Slaughter was not a sociopath, but could overcome most of his problems if put in the right environment. The majority reversed, holding that it was not reasonably probable that this information would have influenced a single juror to spare Slaughter's life. One juror, however, has since provided an affidavit stating that had she known of this information, she would have sentenced him to life in prison.

The panel unanimously agreed that trial counsel's failures amounted to a constitutionally defective performance. (Counsel now faces perjury charges for testifying at Slaughter's post-conviction proceedings that his experience included trying four capital cases before Slaughter's; in truth, he had not tried any.) The majority ruled that these failures were not prejudicial, however, because the mitigating evidence discussed above was not significantly different from the evidence offered at the penalty phase through two witnesses: (1) Slaughter himself (who testified to some facts of his abusive upbringing); and (2) a court-appointed clinical psychologist (whose testimony included that Slaughter had a borderline personality disorder and could be a candidate for reform).

II. DISCUSSION

A. Penalty-Phase Transgressions: Brain-Damage Evidence and Self-Serving Testimony

Disagreements about whether counsel's ineffectiveness prejudiced a capital defendant are commonplace; the majority's holding on this point, however, creates two

particular conflicts that should have been resolved by the en banc Court.

First, it conflicts with cases concluding prejudice occurred where, although some mitigating evidence was presented, evidence of severe childhood abuse and diminished mental capacity was not. *See Wiggins v. Smith,* 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Williams v. Taylor,* 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). This conflict is particularly stark where the absent evidence includes, as here, possible brain damage to the defendant. *See Harries v. Bell,* 417 F.3d 631 (6th Cir. 2005) (granting relief where defendant "suffered damage to the frontal lobe of his brain, ... [damage which] can result from head injuries and can interfere with a person's judgment and decrease a person's ability to control impulses"); *Hamblin v. Mitchell,* 354 F.3d 482 (6th Cir. 2003) (granting relief where jury did not hear of defendant's brain damage from severe blow to the head during childhood); *Glenn v. Tate,* 71 F.3d 1204, 1207 (6th Cir. 1996) (granting relief where jury did not hear of defendant's brain damage). Slaughter will be executed in violation of this clear law.

Second, the holding presumes a defendant's self-serving testimony—even when he testifies to spare his own life—has the same impact regardless of whether other witnesses corroborate it. That conflicts with the Supreme Court's recognition in *Skipper v. South Carolina,* 476 U.S. 1, 8, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986), that a defendant's testimony is inherently suspect and a jury will naturally discount it. *See also Clinkscale v. Carter,* 375 F.3d 430, 445 (6th Cir. 2004) (noting that defendant's testimony would appear "much more credible" had even one other witness testified similarly). The image presented to the jury was a man so loathed that nobody—not even his family—would

corroborate his testimony or plead for his life. In reality, his family—including the younger siblings he protected as a child—would have testified in this way, but they never knew he was on trial. This Court nonetheless approves his execution.

B. The Waiver Problem

The majority also held that Slaughter failed to raise adequately to the state supreme court his federal claim that he was denied due process and an impartial sentencing jury when the trial court allowed a juror to question him. Slaughter's brief to the state court on this issue stated that "[b]ased on this denial of due process and a fair trial by an impartial jury, appellant is entitled to a new trial." The brief then cited to the "14th and 6th Amendments."

Relying on *Whiting v. Burt,* 395 F.3d 602, 613 (6th Cir. 2005), the majority properly explained that one way a petitioner may fairly present a federal claim is by "phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right." Despite Slaughter's explicit reference to the appropriate constitutional amendments, however, the majority ruled Slaughter did not properly raise his claim because he did not reference federal *cases.* That ruling conflicts with *Newton v. Million,* 349 F.3d 873, 877 (6th Cir. 2003), in which this Court held that "[t]here is no requirement that the petitioner cite to cases that employ federal constitutional analysis where he has phrased his claim in terms of a denial of a specific constitutional right." The majority's decision thus effectively overrules—without discussion—*Newton* and similar decisions. Without en banc review, we are left with authority that stands for an absurdity: A petitioner fails to present a federal claim for relief when

citing to the precise *constitutional text* that is the genesis of the claim itself.

III. CONCLUSION

It is no surprise that the jury sentencing "James Earl Slaughter"—an apparent menace with no redeeming qualities and not even a single family member to suggest his life should be spared—felt compelled to sentence him to death. Although we cannot be absolutely certain that a single juror sentencing Jeffrey Leonard—a likely brain-damaged man whose family would corroborate his testimony and plead for his life—would come to a different conclusion, this Court's decision leaves one aspect of this case indisputable: We will never know. I respectfully dissent.

Appendix G

Statutory Provisions Involved

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

28 U.S.C. § 2254(d):

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

CORRECTED COPY

(6)

No. 06-1317

Supreme Court, U.S.
FILED
MAY 3 - 2007
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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES EARL SLAUGHTER,
a/k/a JAMES EARL SLAWTER,
a/k/a JEFFREY DEVAN LEONARD

versus ***Petitioner***

THOMAS SIMPSON, WARDEN

Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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* Counsel of Record

CAPITAL CASE

COUNTERSTATEMENT OF QUESTION PRESENTED

I. **MUST MITIGATION TESTIMONY BE CORROBORATED BY MULTIPLE WITNESSES IN ORDER FOR DEFENSE COUNSEL TO BE EFFECTIVE IN A CAPITAL MURDER TRIAL?**

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

The parties to the proceeding in the Court whose judgment is under review are: (1) the Commonwealth of Kentucky; and (2) James Earl Slaughter a/ka James Earl Slawter a/k/a Jeffrey Devan Leonard.

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

COUNTERSTATEMENT OF THE CASE 4

REASONS WHY CERTIORARI SHOULD BE DENIED 8

COUNTERSTATEMENT 11

TABLE OF AUTHORITIES

Broom v. Mitchell, 441 F.3d 392
(6th Cir. 2006), *cert. denied*, 127 S.Ct. 1376 (2007) 9

Slaughter a/k/a Slawter v. Commonwealth,
744 S.W.2d 407 (Ky. 1988) 2

Slaughter v. Kentucky, 490 U.S. 1113 (1989) 2

Slaughter v. Kentucky, 528 U.S. 1192 (2000). 2

Slaughter v. Parker,
187 F.Supp. 2d 755 (W.D. Ky. 2001) 3

Slaughter v. Parker, 450 F.3d 224 (6th Cir. 2006) 3

Slaughter v.Parker, 467 F.3d 511 (6th Cir. 2006) 3

Strickland v. Washington, 466 U.S. 668 (1984) 9

Respondent respectfully opposes the petition for a writ of certiorari.

OPINIONS BELOW

Respondent does not accept Petitioner's account of the opinions below. Petitioner's account is incomplete and the case citations therein are purposely un-captioned.

After the Sixth Circuit affirmed the denial of habeas corpus relief, Petitioner's counsel suddenly started referring to him as "Jeffrey Leonard" in hopes of making a point about the merits of his counsel ineffectiveness claim. The claim is that trial defense counsel was ineffective for not learning Petitioner's "real name."

Heretofore the Petitioner has gone by the name James Slaughter or James Slawter in all of his legal proceedings. Petitioner swore under oath at

trial, in his post-conviction motion, and in his federal habeas petition that his name is James Slaughter.

Petitioner's "opinions below" section omits the captions of any of his prior cases because they all refer to him as James Slaughter. For the same purpose of avoidance, Petitioner's cover page refers only to "Jeffrey Leonard."

Petitioner's death sentence for the 1983 murder of Ester Stewart was affirmed on direct appeal in Slaughter a/k/a Slawter v. Commonwealth, 744 S.W.2d 407 (Ky. 1988). Certiorari was denied in Slaughter v. Kentucky, 490 U.S. 1113 (1989).

The Kentucky Supreme Court affirmed the denial of post-conviction relief by unpublished opinion rendered April 22, 1999. Certiorari was denied in Slaughter v. Kentucky, 528 U.S. 1192

(2000).

The U.S. District Court denied habeas relief in Slaughter v. Parker, 187 F.Supp. 2d 755 (W.D. Ky. 2001). The Sixth Circuit affirmed in Slaughter v. Parker, 450 F.3d 224 (6th Cir. 2006). The order denying *en banc* rehearing is reported as Slaughter v.Parker, 467 F.3d 511 (6th Cir. 2006).

JURISDICTION

Respondent accepts the account of jurisdiction appearing in the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the account of constitutional and statutory provisions appearing in the appendix to the petition.

COUNTERSTATEMENT OF THE CASE

The facts of this case and its procedural history are adequately summarized in the majority opinion below. Slaughter v. Parker, *supra*, 450 F.3d 224. Additional facts pertinent to the proceeding before this Court are supplied below.

Petitioner testified during the penalty phase of his trial. Petitioner offered the following information in mitigation of punishment:

(1) his legal name was James Earl Slaughter;

(2) he quit school in the seventh grade at age 12;

(3) he obtained his GED at age 17;

(4) his father and mother were separated when he was 3 years old;

(5) his family was transient when he was young;

(6) his father was killed while serving a prison sentence in 1972;

(7) he was abused as a child – for example, his mother would whip him with an extension cord;

(8) he ran away from home at age 12;

(9) his mother died of cancer in 1980;

(10) he had a three year old child living with its mother in Houston, Texas;

(11) he had supported the child in the past;

(12) he had problems with alcohol, amphetamines, hallucinogens, and cannabis; and

(13) he was taking classes at LaGrange Reformatory.

(TE, 1345, 1346, 1347, 1348, 1350, 1351, 1358).

A neutral psychiatrist was appointed pursuant to state law upon Petitioner's written notice of intent

to rely on a mental defense. The psychologist who examined Petitioner was called by the defense to offer mitigation testimony beyond (and corroboration of) that already provided to the capital sentencing jury by Petitioner's own testimony:

(1) although Slaughter is of normal intelligence, he provided "confusing" information regarding his social and family history;

(2) Slaughter refused to identify his place of birth;

(3) Slaughter suffered from alcohol, amphetamine, hallucinogen, and cannabis abuse;

(4) Slaughter suffered from a "border line personality disorder" which causes problems with family and with peers, occupational problems, and academic problems;

(5) Slaughter's disorder could be genetic or hereditary in origin;

(6) Slaughter was a "marginally functioning" individual, unable to establish relationships with peers or friends, unable to hold extended employment, and no lasting relationships with his family;

(7) Slaughter's condition could improve with therapy in a structured environment; and

(8) Slaughter "shielded" his family and support group from the evaluation and trial, and he was not cooperative with testing. (TE 1382, 1383, 1386, 1387, 1389, 1390, 1393, 1397, 1399, 1400, 1403).

The mitigating circumstances were set out in the instructions to the capital sentencing jury. (TR 131).

REASONS WHY CERTIORARI SHOULD BE DENIED

As an initial matter, it should be noted that the preamble to Petitioner's lengthy "question presented" misstates the Sixth Circuit's vote to deny rehearing. Petitioner refers to the vote as "a seven to seven stalemate." (Petition, p. i). However, the order denying rehearing merely says that "less than a majority of the judges having favored the suggestion . . . ." Slaughter v. Parker, *supra*, 467 F.3d at 511. There are multiple ways in which a federal circuit judge can express disagreement with the vote on a petition for rehearing *en banc*. Only the five dissenters expressed disagreement with the vote.

As for the merits of Petitioner's counsel ineffectiveness claim, Petitioner's argument rests on the false premise that mitigation is not adequately

presented unless it is corroborated by multiple witnesses. As shown in the counterstatement of the case in this brief, Petitioner's testimony about mitigation was largely corroborated by that of the psychiatrist called at trial. The additional testimony urged in the petition would have been cumulative at best. State evidentiary law recognizes the phenomenon of diminishing returns: It is neither worthwhile nor always permissible to corroborate what has already been corroborated.

Petitioner also takes issue with the Sixth Circuit's application of Strickland v. Washington, 466 U.S. 668 (1984) in his case. Petitioner bases his complaint on what the Sixth Circuit has said about Strickland in cases other than his own, *e.g.*, Broom v. Mitchell, 441 F.3d 392, 410 (6th Cir. 2006, *cert. denied*, 127 S.Ct. 1376 (2007)("to establish

prejudice, the new evidence that a habeas petitioner presents must **differ in a substantial way – in strength and subject matter** – from the evidence actually presented at sentencing") (emphasis added).

It occurs to Respondent that omitted evidence no different in strength and subject matter would be most unlikely to alter the outcome. More to the point, though, in Petitioner's case the Sixth Circuit correctly applied Strickland's "reasonable probability of a different outcome" standard of review.

CONCLUSION

WHEREFORE, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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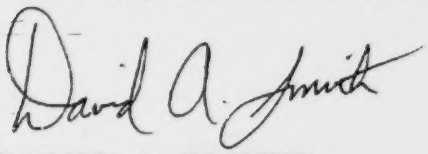
Attorney General of Kentucky



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IN THE

Supreme Court of the United States

JEFFREY DEVAN LEONARD,
Petitioner,

v.

THOMAS SIMPSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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May 14, 2007

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ARGUMENT

The petition for certiorari seeks review of a case in which "trial counsel in a capital murder prosecution made absolutely no preparation and no investigation for the penalty phase of the trial." Pet. App. 192a. As a result, "a 20-year-old, African American male, with no prior violent felony history, was sentenced to death by a jury that did not know his true background, family and social history, or even his true name." Pet. App. 196a. The State's opposition to the petition is (at best) cavalier. Rather than offer case citations or argument, the State devotes most of its brief to bizarre insinuations about Leonard's petition, *see* Opp. 1-2, notwithstanding that the petition was correctly captioned and complied with this Court's rules of practice. At this point in the proceedings, possibly the last chapter before the issuance of a death warrant, a condemned prisoner deserves better than the nonchalant response the State offers here. This is particularly so given that there is no genuine dispute on the core point that petitioner Leonard received shockingly inadequate representation at sentencing — as even the Sixth Circuit majority below held — and given that Leonard's petition for rehearing resulted in a "seven to seven stalemate" in the Court of Appeals, Pet. App. 254a, with at least five federal appellate judges (as well as a federal district judge) concluding that Leonard was prejudiced by his lawyer's failure to discharge even the most basic professional responsibilities to his client.

1. Perhaps the only clear aspect of the State's opposition is what it *fails* to say. The State nowhere contests that the Circuits are intractably divided on when a constitutionally deficient counsel's failure to present mitigation evidence prejudices a defendant under *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. 17-24. The State agrees with Leonard that the Sixth Circuit disregards undiscovered mitigation

evidence unless the evidence "*differ[s] in a substantial way — in strength and subject matter*" from the evidence presented at sentencing. Opp. 9-10 (quoting *Broom v. Mitchell*, 441 F.3d 392, 410 (6th Cir. 2006) (alteration added)); Pet. 18. Thus, the State embraces the petition's contention that the Sixth Circuit, along with the Fourth and Fifth Circuits, will find no prejudice as long as some subset of the existing mitigation evidence has previously found its way to the sentencing jury's ears. Pet. 18-21. The Third, Ninth, and Tenth Circuits have rejected this incorrect application of *Strickland* and will find prejudice when there is a reasonable probability that the jury, having heard the omitted evidence (along with the evidence adduced at sentencing), would not have imposed the death penalty. Pet. 17, 22-23. There is, in short, an undeniable conflict between the Circuits on the proper application of *Strickland*.

2. In defense of the Sixth Circuit's standard, the State weakly notes only that evidence that is "no different in strength and subject matter would be most unlikely to alter the outcome." Opp. 10. But the State misses the point: The Sixth Circuit standard precludes consideration of evidence when it fails to differ *either* in strength *or* in subject matter. As other Circuits have recognized, however, the fact that some small amount of evidence on a particular subject matter has reached the jury does not negate the prospect that a jury might reasonably have found a more robust presentation of evidence on that subject matter to be persuasive.

3. As to the particular prejudice Leonard has suffered, the State offers nothing more — but nothing less — than rank mischaracterization of the record. The State contends that Leonard's testimony at sentencing was "largely corroborated" by the state psychologist's testimony. Opp. 9. Not only is this wrong, it is a position that even the Sixth Circuit panel did not adopt. Pet. 14a-15a. Leonard testified

to some aspects of his childhood at sentencing, but the state psychologist, who only met Leonard as an adult, could not have and did not provide independent "corroboration" of Leonard's testimony regarding his family. The only witnesses who could have testified from personal knowledge as to the brutality and deprivation of Leonard's childhood were prevented from offering their testimony by the egregiously deficient performance of Leonard's counsel. Pet. App. 192a-196a. As a result, the sentencing jury heard no corroboration at all of Leonard's testimony regarding his childhood abuse and neglect. The State fails even to acknowledge this Court's holding that a defendant's testimony in his own favor is bound to be discounted by a jury. *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986).

Moreover, the State entirely ignores the other consequences of trial counsel's failures. Thus, the State (like the Sixth Circuit) ignores that the absence of family members deprived Leonard of testimony that would have humanized him, thus leaving the jury with the misimpression that even Leonard's own family supported his execution. *See* Pet. 26 (describing different treatments in the Courts of Appeals of this issue). And the State (like the Sixth Circuit) ignores that counsel's reliance on the State psychologist — who had evaluated Leonard only for his competency to stand trial — actually resulted in the introduction of testimony that was both affirmatively harmful and medically erroneous, and deprived the jury of a full picture of Leonard's substantial psychological and neurological problems. *See Abdul-Kabir v. Quarterman*, 550 U. S. ___ (2007) (slip op. at 27) (noting that "possible neurological damage" is powerful mitigating evidence).

In short, there is no basis for denying that the Sixth Circuit applied its restrictive analysis in Leonard's case and, as a result, treated as "cumulative" the testimony from

Slaughter's family members and the newly available expert testimony on the consequences of Slaughter's childhood brain injury. Pet. App. 14a-15a. The Sixth Circuit's test for *Strickland* prejudice is a manifest misapplication of this Court's precedents, which require the reviewing court to consider the entire impact of all the undiscovered mitigation evidence in determining *Strickland* prejudice. *See* Pet. 27-28. The State's bare citation to *Strickland*, Opp. 9, in the course of its cursory opposition does nothing to rehabilitate the Sixth Circuit's deeply flawed adjudication of Leonard's habeas claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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34

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THOMAS SIMPSON,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CATHOLIC CONFERENCE OF KENTUCKY IN SUPPORT OF PETITIONER, JEFFREY DEVAN LEONARD

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Interest of the Amicus Curiae 1

Summary of Argument 2

Argument 3

Conclusion 9

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U.S. 304 (2002) 2

Blystone v. Pennsylvania, 494 U.S. 299 (1990) 3

California v. Brown, 479 U.S. 538 (1987) 3

Eddings v. Oklahoma, 455 U.S. 104 (1982) 3

Furman v. Georgia, 408 U.S. 238 (1972) 3

Gholson v. Estelle, 675 F.2d 734 (5th Cir. 1982) 3

Lockett v. Ohio, 438 U.S. 586 (1978) 3, 8

Roper v. Simmons, 543 U.S. 551 (2005) 3

Slaughter v. Parker, 450 F.3d 224 (6th Cir. 2006) 8

Sumner v. Shuman, 483 U.S. 66 (1987) 3

Witherspoon v. Illinois, 391 U.S. 510 (1968) 8, 9

Woodson v. North Carolina, 428 U.S. 280 (1976) . . . 3, 8

Other

Catechism of the Catholic Church, nos 2266, 2267, 2271, 2277 . . . . . 3, 4

Catholic bishops of Kentucky, "A Catholic Perspective on Crime and Criminal Justice: A Kentucky Call to Responsibility, Rehabilitation, and Restoration", http://www.ccky.org/Pastoral%20Resources/Ky%20RRR%20Initiative.pdf. 7

John J. Pilch, *The Cultural World of Jesus, Sunday by Sunday, Cycle A* 22-24 (The Liturgical Press 1995) . . . 6

Kentucky pastoral letter "Choose Life: Reflections on the Death Penalty" (1985; re-issued 1995) 5

Pope John Paul II, "The Gospel of Life: On the Value and Inviolability of Human Life" (1995) 6

Statement of the Administrative Board, United States Catholic Conference, *A Good Friday Appeal to End the Death Penalty* (Mar. 1999) 5

United States Bishops' "Statement on Capital Punishment" (Nov. 1980) 5, 9

United States Bishops, "Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice" (Nov. 2000), http://www.usccb. org/sdwp/criminal.htm 7

I

INTEREST OF THE *AMICUS CURIAE*

The Catholic Conference of Kentucky (CCK) is a nonprofit agency of the Catholic bishops of Kentucky, established in 1968.[1] The active bishops of the four dioceses of Kentucky constitute CCK's Board of Directors. The bishops speak collegially for the Church in the Commonwealth through CCK on matters affecting the Catholic Church in the state, its people, and society in general. CCK advocates and promotes the pastoral teaching of the Church on diverse issues, including the protection of human rights and the sanctity of human life. There are 406,000 Catholics in the Commonwealth.

The provision of adequate counsel for the defense of one whom the state intends to execute is unquestionably an essential prerequisite to the moral functioning of the criminal justice process. The concern of the *amicus curiae* is that the process has failed in the case of Jeffrey Leonard because of the woeful representation he received during his trial. The *amicus curiae* has grave reservations concerning the morality of executing Mr. Leonard, especially considering the jury that

---

[1] Pursuant to this Court's Rule 37.6, counsel for a party did not author this Brief in whole or in part. No person or entity, other than the Catholic Conference of Kentucky, made a monetary contribution to the preparation or submission of this Brief. Thomas M. Ransdell is an employee of the Kentucky Department of Public Advocacy (DPA). Although other employees of the DPA have represented Mr. Leonard during his post-conviction proceedings, Mr. Ransdell has never served as legal counsel for Mr. Leonard. Mr. Ransdell used leave time and non-working hours to prepare his portion of this brief. The parties have consented to the filing of this Brief. Letters of consent are filed herewith.

sentenced him to death was never allowed to hear the extensive mitigating circumstances in this case.

SUMMARY OF ARGUMENT

If there once was any doubt about the relevance of the views of the religious community in deciding the constitutionality of certain punishments, it was removed by this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). There a majority of this Court made clear that the views of religious organizations are "[a]dditional evidence" of a broad social and professional consensus against the imposition of the death penalty for a particular class of persons. *Id.*, 536 U.S., at 316 n.21.

In its traditional teaching, the Catholic Church affirms the right and duty of legitimate public authority to inflict punishment proportionate to the gravity of the offense. Recourse to the death penalty is not absolutely excluded. However, recourse to the death penalty should be limited to situations where it is the only possible way of effectively defending human lives against the unjust aggressor. In contemporary society, where the state has other non-lethal means to protect its citizens, the state should not use the death penalty. Nevertheless, if the state chooses to allow capital punishment, the provision of adequate counsel is necessary to ensure that the punishment is not arbitrarily or unjustly imposed.

Jeffrey Leonard did not receive adequate counsel. Every federal judge to review his case has agreed that his attorney did not perform in a reasonably competent manner. Due to his attorney's shortcomings, substantial mitigating evidence was never presented to the jury that sentenced Leonard to death. The *amicus curiae*, Catholic Conference of Kentucky, has

grave concerns about the morality of executing Mr. Leonard under these circumstances.

ARGUMENT

This Court's death penalty jurisprudence since *Furman v. Georgia*, 408 U.S. 238 (1972), has required that the imposition of the death penalty be a reasoned moral response to the personal blameworthiness of the accused. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The Court has steadfastly recognized that not all who murder should be put to death. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Sumner v. Shuman*, 483 U.S. 66 (1987); *Roper v. Simmons*, 543 U.S. 551 (2005). The death penalty is reserved for those few who have committed crimes under the most aggravated circumstances, and only after their sentencer has been allowed to give full effect to any mitigating circumstances that would call for a less extreme punishment. *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

It follows, then, that a decision to impose and carry out a sentence of death is essentially a moral decision. *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). In order to carry moral weight the decision must be based upon an accurate understanding of the relevant facts concerning the circumstances of the offense and the personal moral blameworthiness of the offender. *Gholson v. Estelle*, 675 F.2d 734, 738 (5th Cir. 1982) ("If a person is to be executed, it should be as a result of a decision based on reason and reliable evidence").

In its traditional teaching as summarized in the *Catechism of the Catholic Church*, the Church affirms the right and duty of legitimate public authority "to inflict punishment proportionate to the gravity of the offense." *Id.*, at no. 2266.

Recourse to the death penalty is not absolutely excluded. *See* no. 2267. The death penalty is not intrinsically evil, as is the intentional taking of innocent life through abortion or euthanasia. *See* nos. 2271, 2277. Nevertheless, the Church teaches that in contemporary society where the state has other non-lethal means to protect its citizens, the state should not use the death penalty:

> Assuming that the guilty party's identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor.
>
> If, however, non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person.
>
> Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm -- without definitively taking away from him the possibility of redeeming himself -- the cases in which the execution of the offender is an absolute necessity "are very rare, if not practically non-existent."

Catechism of the Catholic Church, no. 2267 (*quoting* John Paul II, *Evangelium Vitae*, 56).

This universal teaching of the Church is mirrored in the statements of the Catholic bishops of the United States who, "[f]or more than twenty-five years," have "called for an end to the death penalty in our land." Statement of the Administrative Board, United States Catholic Conference, *A Good Friday Appeal to End the Death Penalty* (Mar. 1999). The bishops' appeal to abolish the death penalty is based on their conviction that "in the conditions of contemporary American society, the legitimate purposes of punishment do not justify the imposition of the death penalty." United States Bishops' Statement on Capital Punishment ¶ 9 (Nov. 1980). Our relationship to our Creator is directly connected to what we do to others and how we do it. In the Kentucky pastoral letter "Choose Life: Reflections on the Death Penalty" (1985; re-issued 1995), the bishops of the Commonwealth of Kentucky concluded,

> [T]he death penalty is inconsistent with Jesus' own example of forgiveness that offered hope and the possibility of conversion. It is our judgment that putting human beings to death is a rejection of hope toward the condemned persons and it may deny them the opportunity to move from sin to repentance. The Gospel proclaims that even the most hardened sinner is a person to be redeemed rather than destroyed.
>
> Second, the death penalty is inconsistent with the biblical vision of human beings as worthy of love regardless of their merit.
>
> Finally, the death penalty is inconsistent with our belief as Christians that what we do to other human beings is an indication of our relationship with God.

Id., at 6.

The right to counsel for a defendant to insure a just result has its roots in the Hebrew and Christian Scriptures and is recognized as important by religious leaders today. Most evident from the early Scriptures in this regard are the admonishments by the prophets to those who did not justly and fairly treat the accused "in the gate" of the city, which was the site for the judicial system of the time where justice was administered.[2] Justice for the poor and vulnerable is one of the most pervasive themes in the Old Testament.

Christian leaders today continue the call for insuring justice for the poor. Pope John Paul II taught in "The Gospel of Life: On the Value and Inviolability of Human Life" (1995), "As disciples of Jesus, we are called to become neighbors to everyone (cf. Lk10:29-37), and to show special favour to those who are the poorest, most alone and most in need." In November 2000, the United States Bishops issued

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[2] John J. Pilch, *The Cultural World of Jesus, Sunday by Sunday, Cycle A* 22-24 (The Liturgical Press 1995). ("Trials in ancient Israel were decided by the leading men of the city or synagogue who administered justice 'in the gate' (see Amos 5:15; Deut 19:12))."

Amos 5:7, 15: "Woe to those who turn judgment to wormwood and cast justice to the ground! ...Hate evil and love good, and let justice prevail at the gate; Then it may be that the LORD, the God of hosts, will have pity on the remnant of Joseph."

Job 5:4: "His children shall be far from safety; they shall be crushed at the gate without a rescuer."

Isaiah 29: 20-21: "For the tyrant will be no more and the arrogant will have gone; All who are alert to do evil will be cut off, those whose mere word condemns a man, Who ensnare his defender at the gate, and leave the just man with an empty claim."

a statement on crime and criminal justice, "Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice."[3] In that statement, the bishops say:

> The fundamental starting point for all of Catholic social teaching is the defense of human life and dignity: every human person is created in the image and likeness of God and has an inviolable dignity, value, and worth, regardless of race, gender, class, or other human characteristics. Therefore, both the most wounded victim and the most callous criminal retain their humanity. All are created in the image of God and possess a dignity, value, and worth that must be recognized, promoted, safeguarded, and defended.

The bishops also recognized, "The Option for the Poor and Vulnerable: This principle of Catholic social teaching recognizes that every public policy must be assessed by how it will affect the poorest and most vulnerable people in our society."

More recently, the Catholic bishops of Kentucky issued "A Catholic Perspective on Crime and Criminal Justice: A Kentucky Call to Responsibility, Rehabilitation, and Restoration,"[4] which called for Catholic principles and values to be instilled in Kentucky's criminal justice system and recognized that one of those values is that "we all are responsible for all."

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[3] The statement can be found on the Internet at http://www.usccb.org/sdwp/criminal.htm.

[4] Published on the Internet at http://www.ccky.org/Pastoral%20Resources/Ky%20RRR%20Initiative.pdf.

The lower federal courts have all agreed that Jeffrey Leonard did not receive the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution. His attorney admitted conducting virtually no mitigation investigation. The mitigating evidence that was overlooked is detailed in the petition for a writ of certiorari filed on behalf of Mr. Leonard. The jury that sentenced Mr. Leonard to death was never informed that he has possible brain damage from a skull fracture during his childhood. They were never informed he had a childhood skull fracture or even a head injury. They were given an inaccurate picture of Mr. Leonard's mental problems based upon incomplete testing by a state psychologist. They were never informed of the mitigating mental health evidence that was uncovered by independent mental health professionals during the post-conviction proceedings. The jury was never told how, as a child, Mr. Leonard cared for his younger siblings -- how he tried to protect them from abusive adults in the household, and tried to make sure they had food and nourishment. The jury never learned that Mr. Leonard still carries the scars on his body from the childhood beatings he received. Because his trial attorney "made no effort to research [Mr. Leonard's] family background," *Slaughter v. Parker*, 450 F.3d 224, 230 (6th Cir. 2006), the jury never heard Mr. Leonard's mother and two brothers say that they loved him and did not want him to die.

In the past, this Court has insisted on "individualized consideration as a constitutional requirement in imposing the death sentence." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). The sentencing jury must conduct a "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). In *Witherspoon v. Illinois*, 391 U.S.

510, 520 n.15 (1968), the Court said, "[O]ne of the most important functions any jury can perform in making [a selection between life and death in a capital case] is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment would hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" The jury cannot perform this important function when it is uninformed and misinformed about the evidence that would call for a sentence of less than death due to ineffective representation by the accused's counsel.

The Catholic Church accepts in "principle that the state has the right to take the life of a person guilty of an extremely serious crime ... ." The United States Bishops' "Statement on Capital Punishment" ¶ 4 (Nov. 1980). However, the situations in which the death penalty is an acceptable punishment are extremely rare. Certainly, the death penalty should never be carried out in a case, such as this one, where the accused was prevented from presenting the jury with substantial, material mitigating evidence based on the negligence of his attorney.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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54

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ON PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE

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THIS IS A CAPITAL CASE

QUESTION PRESENTED

Given that appellate courts must determine whether a "reasonable probability" exists that, absent the errors, the sentencer would have concluded the balance of aggravating and mitigating circumstances did not warrant death:

I. When evaluating ineffective assistance of counsel claims pursuant to the *Strickland* standard, may the Fourth and Sixth Circuits categorically refuse to consider mitigation evidence adduced during the capital post-conviction stage that differs only in degree (and not kind) from the mitigation evidence presented at trial?

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TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

A. Mr. Jeffrey Leonard and the Childhood Abuse Evidence 4

B. Dr. Johnson's Testimony 4

C. The Post-Conviction Experts and the Medical History Evidence 5

ARGUMENT 6

I. THE DEGREE AND KIND BARRIER VIOLATES *STRICKLAND* BY PRECLUDING A DETERMINATION OF WHETHER THERE EXISTS A REASONABLE PROBABILITY THAT, ABSENT THE ERRORS, THE SENTENCER WOULD HAVE CONCLUDED THE BALANCE OF AGGRAVATING AND MITIGATING CIRCUMSTANCES DID NOT WARRANT DEATH 6

A. Post-conviction Mitigation Evidence Substantially Differing In Degree From Mitigation Evidence Adduced During The Penalty Phase Can Suffice To Establish Prejudice. 7

i. The degree and kind barrier conflicts with over two decades' worth of this court's *Strickland* jurisprudence. 7

ii. The degree and kind versus degree or kind split squarely divides the Fourth and Sixth from the Third and Ninth Circuits. 10

A1. Social Science Research Proves That Evidence Differing In Degree But Not Kind Can Alter The Persuasive Effect Of A Defendant's Mitigation Case..... 12

i. Corroboration permits the jury to obtain an independent evaluation of a defendant's social history, thereby making mitigation testimony credible, memorable, and persuasive. 12

ii. Interviews with former capital jurors confirm the empirical evidence suggesting that corroboration enhances persuasive effect. 14

iii. Mitigation evidence that portrays a defendant's social history comprehensively and accurately enhances the jury's objective decision-making. 15

iv. Family member testimony humanizes a defendant by creating an opportunity for jurors to sympathize with the defendant and his family. 16

B. Failure To Eliminate Erroneously Introduced Aggravating Evidence Violates *Strickland* By Precluding An "Absent The Errors" Prejudice Determination. 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES:

Banks v. Dretke,
540 U.S. 668 (2004) 18, 19

Broom v. Mitchell,
441 F.3d 392 (6th Cir. 2006) 8

Buckner v. Polk,
453 F.3d 195 (4th Cir. 2006) 11, 12

Earp v. Ornoski,
431 F.3d 1158 (9th Cir. 2005) 11

Hill v. Mitchell,
400 F.3d 308 (6th Cir. 2005) 11

Hovey v. Ayers,
458 F.3d 892 (9th Cir. 2006) 7, 19

Jermyn v. Horn,
266 F.3d 257 (3d Cir. 2001) 11

Outten v. Kearney,
464 F.3d 401 (3d Cir. 2006) 7, 10

Skipper v. South Carolina,
476 U.S. 1 (1976) 12

Slaughter v. Parker,
187 F. Supp. 2d 755 (W.D. Ky. 2001) 3, 16

Slaughter v. Parker,
450 F.3d 224 (6th Cir. 2006) 9

Slaughter v. Parker,
467 F.3d 511 (6th Cir. 2006) 12, 19

Stankewitz v. Woodford,
365 F.3d 706 (9th Cir. 2004) 10

Strickland v. Washington,
466 U.S. 668 (1984) ..... *passim*

Wiggins v. Smith,
539 U.S. 510 (2003) 8, 9

Williams v. Taylor,
529 U.S. 362 (2000) 3, 8, 9

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Stephen G. Harkins, Richard E. Petty, *Effects of Source Magnification of Cognitive Effort on Attitudes: An Information Processing View*,
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Stephen M. Smith; David R. Shaffer, *Vividness Can Undermine or Enhance Message Processing: The Moderating Role of Vividness Congruency*, Personality and Social Psychology Bulletin, 26, 769 (2000) 15

Scott E. Sundby, *The Jury As Critic: An Empirical Look At How Capital Juries Perceive Expert and Lay Testimony*, 83 Va. L. Rev., 1109 (1997) 14, 15, 16, 17

INTERESTS OF *AMICUS CURIAE* [1]

Established in the fall of 2005 at Harvard Law School, the Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) seeks to honor the extraordinary contributions of one of the great lawyers of the twentieth century. Charles Hamilton Houston dedicated his life to using the law to address matters of racial discrimination. CHHIRJ is committed to continuing Mr. Houston's legacy through research, instruction, and advocacy.

CHHIRJ, through research and litigation, seeks to address various issues of disparity and racial justice. In the present case, CHHIRJ seeks to clarify and address the conflict that exists in the circuit courts over the application of the *Strickland* prejudice prong and suggests the need for this Court to review this case as a means to resolve this conflict.

STATEMENT OF THE CASE

The Sixth Circuit contravenes *Strickland* by constructing a barrier that excludes consideration of all mitigation evidence presented during post-conviction proceedings unless that evidence substantially differs in both degree and kind from the mitigation evidence produced at trial. The plain and commonsense *Strickland* language requires a reviewing court to take an unobstructed view of the post-conviction mitigation evidence to determine if the new evidence differs enough in degree *or* kind from the penalty stage evidence to create a "reasonable probability that, absent the errors, the sentencer would have concluded the balance of aggravating and mitigating circumstances did not warrant death." The Fourth and Sixth Circuits act contrary to

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[1] The parties have consented to the filing of the brief and their letters of consent have been filed with the Clerk of the Court. *Amicus curiae* states that no counsel for either party authored any part of this brief. No person or entity, other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

Strickland by rigidly upholding the degree *and* kind barrier. The Third and Ninth Circuits consider evidence differing in degree *or* kind. The "degree *and* kind" versus "degree *or* kind" formulation confronts this Court with a narrow and outcome determinative circuit split.

This Court need not explain how or when new mitigation evidence of a substantially greater degree constitutes prejudice, but only if magnitude evidence *can* suffice to establish prejudice. Appellate courts certainly maintain the power to determine when post-conviction evidence is merely cumulative. However, under the Sixth Circuit's current approach, the degree and kind barrier mandates that even the most comprehensive post-conviction evidence be automatically considered cumulative if the broad topic category under which that evidence falls has already been broached at trial. As Judge Cole highlights in his dissent below, the Sixth Circuit's rule that even the most comprehensive post-conviction mitigation evidence can never be sufficient to establish prejudice unless it also substantially differs in kind from even the most barebones penalty phase evidence, cannot be reconciled with *Strickland*.

The conflict over whether new mitigation evidence substantially differing in degree *but not kind* can constitute prejudice also squarely divides the Fourth and Sixth, from the Third and Ninth Circuits. The Court should grant certiorari to resolve the conflict amongst the circuits and explain that erecting a degree and kind barrier to prejudice prong review violates *Strickland*.

The Kentucky Supreme Court never adequately[2] reached the prejudice inquiry, thereby providing this Court the opportunity to review the prejudice prong without the added confusion of prejudice prong AEDPA considerations. Every federal judge reviewing this case found performance prong deficiency. This Court could then assume *arguendo* performance deficiency, which would leave the prejudice prong concerns cleanly and squarely presented.

STATEMENT OF THE FACTS

Mr. Leonard's counsel called two penalty phase witnesses—Mr. Leonard himself and Dr. Philip Johnson. Mr. Leonard's testimony regarding his childhood failed to sway the jury to mark even a single mitigating factor on the death ballot. A panel of the Sixth Circuit unanimously agreed that Mr. Leonard's counsel was deficient in his decision to call Dr. Johnson as a defense witness. Mr. Leonard's post-conviction counsel presented what the trial judge considered to be an "impressive" amount of previously unheard mitigation evidence. Mr. Leonard's family members provided detailed, first-hand accounts of Mr. Leonard's abusive childhood. Five medical experts challenged both the conclusions and basis for Dr. Johnson's harmful testimony.

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[2] "[The Kentucky Supreme Court's] conclusion is certainly an unreasonable application of Strickland. It is unreasonable because it fails to provide any analysis of the additional mitigating evidence presented or even to identify such evidence." *Slaughter v. Parker*, 187 F. Supp. 2d 755 (2001); *see Williams v. Taylor*, 529 U.S. 362, 397-398 (2000) (finding that "the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigating evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation.").

A. Mr. Jeffrey Leonard and the Childhood Abuse Evidence

Mr. Jeffrey Leonard's upbringing was akin to "what you see on T.V." *Pet. App.* at 512a. One night, when Mr. Leonard was only eight years old, his stepfather fired a gun at him. As the bullet darted just over the boy's head, Jeffrey Leonard scrambled to leave the house through the front door while carrying his four-year-old brother in his arms. *Pet. App.* at 512a-513a. Mr. Leonard's mother "really whooped the devil" out of her children. *Pet. App.* at 523a. She beat Mr. Leonard with switches, belts, extension cords, and "anything else [she] could get her hands on." *Pet. App.* at 524a. The severe abuse Mr. Leonard suffered left him with adult scars on "the back of his shoulders, the front of his shoulders, sort of around the shoulder itself on each side, the chest area, the thighs and then on the sides of his thighs. He also had some scars on his forearms." *Pet. App.* at 556a.

Mr. Leonard also suffered neglect. One afternoon, four-year-old Mr. Jeffrey Leonard received an accidental gaping wound that cut into his underlying muscle and spanned the width of his forearm. He ran home to seek help from his family. Rather than rushing young Mr. Leonard to the emergency room, the family simply wrapped his arm in rags and left the wound to heal on its own. *Pet. App.* at 556a.

The jury only heard that Mr. Leonard's childhood "wasn't what you might call a real hard life." *Pet. App.* at 283a. "At times, you know, we was the best of home,' he stated. *Pet. App.* at 285a. To Mr. Leonard, being struck with an electrical cord was a reasonable punishment for staying out all night. *Id.* "If you call that abuse," Mr. Leonard told the jury, "that is what it is." *Id.*

B. Dr. Johnson's Testimony

At the time of the trial, Dr. Johnson worked for the Kentucky Correction Psychiatric Center (KCPC). *Pet. App.*

at 620a. The KCPC "has not since, at least, 1980 served to investigate mitigating factors for capital litigation." *Id.* At the time when Dr. Johnson was called to testify as a defense witness, the KCPC had signed an affidavit available to all attorneys in the state with notice that the agency "did not serve in the capacity of expert witness for the defense in capital cases." *Pet. App.* at 630a. Dr. Johnson was appointed by the trial court solely to conduct a competency examination. Dr. Johnson "was not at all prepared [for his penalty phase testimony], nor was he aware of what, in fact, mitigating evidence was and his role in the entire process." *Pet. App.* at 622a.

Dr. Johnson diagnosed Mr. Leonard as having a borderline personality disorder with anti-social traits. *Pet. App.* at 326a. Dr. Johnson stated that another name for Mr. Leonard's disorder is psychopathic personality disorder. *Pet. App.* at 347a. He stated that Mr. Leonard might have a predisposition for violent activities. *Pet. App.* at 333a. Dr. Johnson labeled Mr. Leonard a "marginally functioning individual." *Pet. App.* at 331a. Dr. Johnson predicted that an untreated Mr. Leonard would go "wandering around the country, never establishing any permanence, never achieving much of anything in his life, never contributing anything to society." *Id.* Dr. Johnson stated that if a group of people with lives that closely paralleled Mr. Leonard's were considered, "the likelihood of that group experiencing significant improvement in their life or in their condition is probably relatively poor as a group." *Pet. App.* at 351a.

C. The Post-Conviction Experts and the Medical History Evidence

The five medical experts who testified at Mr. Leonard's post-conviction proceedings were uniformly critical of Dr. Johnson's testing, diagnosis, and testimony. The experts determined that Dr. Johnson had incorrectly and prejudicially scored Mr. Leonard's diagnostic tests and im-

properly used the Rorschach drawing test as a tool for diagnosis. *Pet. App.* at 471a. Dr. Johnson's results were compared to "thrashing in the dark making hypotheses, but not having any way of verifying them." *Pet. App.* at 342a. The results thus could not be supported. *Pet. App.* at 448a.

Dr. Delbert Drogin concluded that Mr. Leonard suffered from a cognitive disorder that likely stemmed from a head injury that Mr. Leonard received as a child. *Pet. App.* at 376a. He also testified that there are a number of factors that indicate Mr. Leonard's potential for successful rehabilitation. *Pet. App.* at 399a. Lane Veltkamp, a clinical social worker, testified that a highly structured environment such as prison would be helpful for Mr. Leonard. *Pet. App.* at 718a. Dr. Eric Engum highlighted that Mr. Leonard "appeared to be performing very well within the institutional setting" of prison. *Pet. App.* at 496a. Dr. Engum explained that Mr. Leonard has engaged in "self-help" since being incarcerated and insisted that test scores indicate that Mr. Leonard has progressed "remarkably well." *Id.*

ARGUMENT

I. THE DEGREE AND KIND BARRIER VIOLATES *STRICKLAND* BY PRECLUDING A DETERMINATION OF WHETHER THERE EXISTS A REASONABLE PROBABILITY THAT, ABSENT THE ERRORS, THE SENTENCER WOULD HAVE CONCLUDED THE BALANCE OF AGGRAVATING AND MITIGATING CIRCUMSTANCES DID NOT WARRANT DEATH.

Prejudice cannot be determined unless a court considers post-conviction evidence differing either in degree *or* kind. The *Strickland* Court fashioned the prejudice prong inquiry to gauge whether a defendant suffers actual prejudice from his counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 693 (1984) ("defendant must

show that [particular errors of counsel] actually had an adverse effect on the defense."). The Sixth Circuit's degree and kind requirement impedes a court's ability to determine prejudice because the court cannot consider how new mitigation evidence differing in degree *or* kind, *but not both*, would have influenced the penalty phase outcome. Contrary to opinions issued by the Fourth and Sixth Circuits, evidence that differs in either degree *or* kind can alter the outcome of a penalty phase proceeding by underscoring the extent of a defendant's reduced moral culpability. *See, e.g.*, *Outten v. Kearney*, 464 F.3d 401, 420 (3d Cir. 2006) ("We have rejected expressly the Pennsylvania Supreme Court's conclusion that the failure to present additional mitigating evidence was not prejudicial simply because the jury had some awareness of a petitioner's childhood and mental illness."). Moreover, the degree and kind requirement precludes evaluation of post-conviction mitigation evidence differing in strength from penalty phase evidence on the same subject even if that penalty phase evidence never would had been introduced but for counsel's deficient performance. *See Hovey v. Ayers*, 458 F.3d 892, 930 (9th Cir. 2006) (eliminating "inaccurate and inconsistent" penalty phase testimony that would not have been introduced but for counsel's deficient performance).

A. Post-Conviction Mitigation Evidence Substantially Differing in Degree from Mitigation Evidence Adduced During the Penalty Phase Can Suffice to Establish Prejudice.

i. The degree and kind barrier conflicts with over two decades worth of this court's *Strickland* jurisprudence.

By requiring post-conviction mitigation evidence to "differ in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing" the Sixth Circuit cannot comply with this Court's mandate to

"consider the totality of the evidence before the judge or jury," because the degree *and* kind formulation categorically ignores evidence adduced during a post-conviction hearing that touches upon any subject raised during the penalty phase, no matter how skeletal the penalty phase treatment or how powerful the post-conviction evidence. *Broom v. Mitchell*, 441 F.3d 392 (6th Cir. 2006); *Strickland*, 466 U.S. at 695.

While not all instances of childhood abuse will be powerful enough to sway a jury to vote for a life sentence, this Court has repeatedly pointed to the *degree* of childhood abuse suffered by the defendant in finding that a defendant was prejudiced by counsel's failure to put forth mitigation evidence. In *Wiggins v. Smith*, this Court explicitly found that the *degree* of abuse can alter an offender's mitigation case: "Given the *nature and extent of the abuse*"[3], there is a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing, and that a jury confronted with such mitigating evidence would have returned with a different sentence." 539 U.S. 510, 534 (2003). Similarly, in *Williams v. Taylor*, the Court underscored the "extensive records graphically describing Williams' nightmarish childhood[4]" that were presented during

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[3] "Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster case. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case. Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535.

[4] "The jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive

the post-conviction hearings. *Williams*, 529 U.S. 362, 398 (2000).

The fact that this Court paid such painstaking attention to the *degree* of childhood abuse suffered by Mr. Wiggins and Mr. Williams demonstrates that *degree* of abuse is an important yardstick for determining prejudice: The Sixth Circuit's failure to consider the extent of the abuse suffered by Mr. Leonard—as presented during post-conviction proceedings—*because* of the fact of his cursory testimony during trial is contrary to this Court's consideration of degree in *Wiggins* and *Williams*. The Sixth Circuit would have summarily discarded all of the extensive childhood abuse evidence adduced during post-conviction, if either Mr. Williams or Mr. Wiggins had uttered even a single sentence to the effect of "I was abused as a child" during the penalty phase.

The majority opinion in *Slaughter* reads: "The jury already heard such [childhood abuse] testimony from [Mr.] Leonard himself." *Slaughter v. Parker*, 450 F.3d 224, 235-235 (6th Cir. 2006). Yet, close review of the entirety of Mr. Leonard's penalty phase testimony highlights the barebones nature of the attempted mitigation push.[5] A juror could have

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home), and then, after his parents were released from prison, had been returned to his parent's custody."

[6] Radolovich: What was your life like at home with your mother and your father?
Leonard: It wasn't—it wasn't what you might call a real hard life. I did wrong at times and I got punished for it.
Radolovich: How did your mother treat you?
Leonard: At times, you know, we was the best of home, you know. Then, again I would go out stay out all night, come back and all hell would break loose.
Radolovich: Were you ever abused?
Leonard: Yeah, you can say that.
Radolovich: How?

possibly concluded that *some minimal abuse* occurred as a result of Mr. Leonard's penalty phase testimony. However, the skeletal nature of Mr. Leonard's testimony combined with his equivocations as to the nature of the abuse and his suggestion that the punishment was deserved, precluded a reasonable juror from believing Mr. Leonard suffered from severe abuse. By contrast, the comprehensive childhood abuse evidence presented at the post-conviction hearings revealed the true *nature and extent* of the abuse that Mr. Leonard suffered. The Sixth Circuit brushed aside this detail-laden portrait of Mr. Leonard's abuse because it differed in *degree* but not *kind* from the cursory evidence presented at trial.

ii. The degree *and* kind versus degree *or* kind split squarely divides the Fourth and Sixth from the Third and Ninth Circuits.

The Third and Ninth Circuits reweigh mitigation evidence taken as whole by recognizing that a substantial change in the degree of mitigation evidence can suffice to establish prejudice. *See Outten v. Kearney*, 464 F.3d 401, 420 (3d Cir. 2006) (explaining that just because some evidence of childhood abuse had been presented to the jury, it did not necessarily follow that the jury had a comprehensive understanding of the abuse); *Stankewitz v. Woodford*, 365 F.3d 706, 716 (9th Cir. 2004) (explaining that "a penalty phase ineffective assistance claim *depends on the magnitude* of the discrepancy between what counsel did investigate and present and what counsel could have investigated and presented"). By contrast, the Fourth and Sixth Circuits refuse to

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Leonard:	Like, you know, at times, when I was being punished, and stuff, she would whip me with the extension cords and stuff like that. If you call that abuse, that is what it is.

Pet. App. at 284a-285a.

find prejudice unless the post-conviction mitigation evidence touches on a topic not introduced during the penalty phase. *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005) (finding that "to establish prejudice, the new evidence that a habeas petitioner presents must differ in a substantial way—*in degree and kind*—from the evidence actually presented at sentencing").

In *Jermyn v. Horn*, the Third Circuit notes that evidence of childhood abuse was presented during the penalty phase, yet finds *Strickland* prejudice because the "strong and specific testimony about a horrific home" presented at the post-conviction hearings evidenced abuse of an "entirely different weight and quality." 266 F.3d 257, 310-311 (3d Cir. 2001). Similarly, in *Earp v. Ornoski*, five witnesses were called during the penalty phase, yet the Ninth Circuit recognized that the "degree of violence, abuse and alcoholism" suffered by Mr. Earp during his formative years "may well paint a materially different picture of Earp's background and culpability" by providing the jury with a "more detailed view of Earp's family background."[6] 431 F.3d 1158, 1177 (9th Cir. 2005).

The Fourth Circuit's decision in *Buckner v. Polk* exemplifies the opposite approach to *Strickland* taken by the Fourth and Sixth Circuits. 453 F.3d 195 (4th Cir. 2006). In *Buckner*, the jury heard only that Mr. Buckner's brother was

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[6] "First, the declarations set forth a more detailed view of Earp's family background. For instance, the declarations allege details of Earp's father's (Don Earp) alcoholic binges, sometimes leading to police dispatches and often resulting in serious beatings of Earp's mother. They also outline Don Earp's slide from alcoholism into suicide after being severely beaten himself, discussing how his violence toward the family and 'uncontrollable rages' intensified. The declarations also set forth an account of Ricky Earp's life after his father's suicide spent in the company of a similarly abusive and alcoholic stepfather in a house where 'finances, and indeed even food and shelter were inconsistent.'" *Earp*, 431 F.3d at 1177.

killed in a house fire. A wealth of information regarding Buckner's childhood was presented during post-conviction proceedings.[7] *Id.* at 204, 205. The *Buckner* Court found that, despite the dramatic difference in magnitude between Buckner's post-conviction and penalty phase mitigation evidence, the former "*differed primarily in degree rather than in kind*" from the evidence that [trial counsel] presented." *Id.* at 204.

A1. Social Science Research Proves That Evidence Differing In Degree But Not Kind Can Alter The Persuasive Effect Of A Defendant's Mitigation Case.

i. Corroboration permits the jury to obtain an independent evaluation of a defendant's social history, thereby making mitigation testimony credible, memorable, and persuasive.

Judge Cole, in his dissent from the denial of rehearing en banc, wrote: "The [majority's] holding presumes a defendant's self-serving testimony—even when he testifies to spare his own life—has the same impact regardless of whether other witnesses corroborate it. That conflicts with the Supreme Court's recognition in *Skipper v. South Carolina,* 476 U.S. 1, 8 (1976), that a defendant's testimony is inherently suspect and a jury will naturally discount it." *Slaughter v. Parker*, 467 F.3d 511, 513 (6th Cir. 2006) (Cole, J., dissenting). A substantial body of empirical evidence bolsters Judge Cole's position. Strong empirical data,

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[7] "The Maxwell affidavit recounts several aspects of Buckner's childhood and young adulthood that Childers did not raise or raised in less detail during sentencing. Buckner's father's physical abuse of his mother when Buckner was a child, his mother's alcoholism during his childhood, his mother's rumored sexual relationship with a female friend who lived with the family during his adolescence, his lack of regular medical and dental care as a child, the death of his father in 1991, and his mother's diagnosis of ovarian cancer." *Id.* at 204, 205.

compiled over the last fifty years, has established that support for a position can be enhanced simply by adding to the number of people who accord with that position. *See generally* Stephen G. Harkins, Richard E. Petty, *Effects of Source Magnification of Cognitive Effort on Attitudes: An Information Processing View*, Journal of Personality and Social Psychology, 40, 401-413 (1981).

In one study conducted by Richard Petty and Stephen Harkins, subjects were exposed to identical persuasive arguments under two different setups. The first group was exposed to the persuasive information as presented by a single person. The second group was exposed to the same persuasive information, but three separate individuals presented these arguments. The results of this and subsequent similar studies point to one conclusion: "Subjects exposed to strong arguments purportedly generated by three different persons generated more positive thoughts than subjects in the one-person condition" *See id.* Even when jurors are aware that defense witnesses share the goal of sparing a defendant's life, simply having independent perspectives on the defendant's social history enhances the persuasive effect of the mitigation evidence: "Our data indicate that six arguments from one person are not as persuasive as six arguments from six people, even when the subjects hearing the one speaker are aware that five other members of the group hold the same view." *Id.* at 411.

The empirical evidence on human decision-making concludes that "multiple sources enhance message processing because of recipients' perceptions that information from multiple sources is more likely to be based on different perspectives and independent pools of knowledge and, thus, more worthy of diligent consideration." *Id.* Corroborative mitigation evidence also enhances persuasion because of the opportunity to reorient to a new stimulus. *See generally* Stephen G. Harkin; Richard E. Petty, *Information Utility and the Multiple Source Effect*, Journal of Personality and Social

Psychology, 52, 260-268 (1987). "That is, each time a new source appears, the participant 'gears up' to process the message. If the arguments are new and compelling, the enhanced processing elicited by multiple sources should result in the generation of additional thoughts favorable to the advocacy or result in fewer thoughts unfavorable to the advocacy, or both." *Id.* Harkins concludes with the following example: "In a criminal trial, a defense attorney may have to decide how many character witnesses to call to support the defendant. The multiple source effect indicates that it would be better to have three people present three positive traits about the defendant than to have one person present all three traits." *Id.*

ii. Interviews with former capital jurors confirm the empirical evidence suggesting that corroboration enhances persuasive effect.

"The testimony of family witnesses, testimony somewhat unique to capital cases in terms of its permitted breadth, generally had a more positive influence on the jury than one might first expect given its inherent bias problems." Scott E. Sundby, *The Jury As Critic: An Empirical Look At How Capital Juries Perceive Expert and Lay Testimony*, 83 Va. L. Rev. 1109, 1159 (1997). Jurors repeatedly emphasize the factual role that family member testimony provided during the penalty phase. These jurors say that by serving in a family historian role, the testimony of a family member allows a juror to place the defendant's social history in context. *Id.* at 1156. One juror emphasized that family member testimony can bring otherwise amorphous facts to life: "While the defendant's child abuse was also documented through neutral sources like court documents, it was the sisters' stories that *every interviewed juror* remembered. Perhaps as remarkable as the sisters' testimony is how distinctly and in what detail the jurors remembered the testimony even several years after the trial." *Id.* at 1157. Another focused on

the powerful impact that a mother's plea for her son's life can have on a jury: "[His] mother...cast a lot of doubt in my mind about his need for capital punishment." *Id.* at 1156.

iii. Mitigation evidence that portrays a defendant's social history comprehensively, vividly and accurately enhances the jury's objective decision making.

Empirical evidence suggests that enhanced vividness of testimony has a strong effect on decision-makers by increasing persuasion and recall. *See* Stephen M. Smith; David R. Shaffer, *Vividness Can Undermine or Enhance Message Processing: The Moderating Role of Vividness Congruency*, Personality and Social Psychology Bulletin, 26, 769-779 (2000). In one case capital jurors voted to give a defendant life despite hearing about his detailed prior violent crime history, including penalty phase testimony from one of the offender's prior rape victims. *See generally*, Scott E. Sundby, *The Jury As Critic: An Empirical Look At How Capital Juries Perceive Expert and Lay Testimony* (1997). Jurors in that case switched their votes to life after hearing family member testimony that vividly and graphically described a "hideous" childhood from which it was "amazing [the defendant] survived." *Id.*

Studies conducted by Stephen Smith reach the conclusion that "participants who read arguments containing vivid imagery congruent with the message conclusion showed the strongest attitudinal differentiation between strong and weak arguments. *Id.* at 776. The story of Mr. Leonard's stepfather, drunk and angry, shooting a bullet from his gun over eight-year-old Jeffrey Leonard's head as he ran from the house carrying his four-year old brother, contains precisely the type of vivid imagery that a jury would remember in great detail even several years after the trial. *Pet. App.* at 524a-525a.

iv. Family member testimony humanizes a defendant by creating an opportunity for jurors to sympathize with the defendant and his family.

Friends and family members "make the jury realize that the defendant is a person about whom others care and are able to sketch a picture of the defendant's life as only someone close to the defendant could." *The Jury As Critic* at 1163. The District Court, in granting Mr. Leonard habeas relief, described the consequences of a defendant not being humanized due to a lack of corroborative character testimony:

> "[The jury] saw "James Earl Leonard," in many senses, the man who never was, standing alone and defiant. [Mr.] Leonard was a man [who] testified recklessly; a man who apparently was so unloved and so uncared for that not a single individual, relative or friend would vouch for him though his life hung in the balance."[8]

Slaughter v. Parker, 187 F. Supp. 2d 755, 841 (W.D. Ky. 2001). As Professor Steven Garvey concluded after his study on empathy in capital sentencing, "...consistent with the prevailing wisdom, jurors who sympathize with the defendant do in fact appear *less apt to vote for death* than jurors who don't." Stephen P. Garvery, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Columbia L. Rev. 1538, 1559 (1998).

Jurors appear to be able to empathize better with defendants by first experiencing an emotional connection with

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[8] Tellingly, similar sentiments have been echoed by former capital jurors themselves: "After it was all over, I asked [the defense attorney], I said, 'Couldn't you find in this man's life one person as a character witness?'" *The Jury As Critic* at 1169.

the defendant's family. *The Jury As Critic* at 1163. "At the most basic level, from an emotional viewpoint, the testimony shows that someone cares about the defendant and believes that he has some redeeming value." *Id.* "Part of the emotional impact appears to stem from the jurors' ability to relate to the parents or sibling in a way that they simply cannot to the defendant that has committed this horrible crime." *Id.* at 1154. "The juror interviews are replete with statements about how such testimony was 'nerve-bending,' and how, as the jury listened to the testimony, 'it got sort of shaky in there,'" *Id.* at 1153. "One juror kept coming back to the sister's testimony because it brought the case to a personal level." *Id.* at 1154 (internal citation omitted). The juror stated that the family members' testimony was the *only* mitigating factor that made her *much less* likely to vote for death. *Id.* "Another juror, who had been a holdout for death because of the circumstances of the crime, identified the family members' testimony...as what persuaded him to vote for life without parole rather than a death sentence." *Id.* A final quotation from these capital juror interviews captures the powerful impact of family member character corroboration: "with such background, the jury can look at a picture of the defendant in his little sailor suit [when] he was only four or five years old, and, for at least a moment, see the defendant as someone other than the adult sitting twenty feet away on trial for two repulsive torture murders." *Id.* at 1158.

B. Failure To Eliminate Erroneously Introduced Aggravating Evidence Violates *Strickland* By Precluding An "Absent The Errors" Prejudice Determination.

The Sixth Circuit used the fact of Dr. Johnson's testimony to preclude serious consideration of the post-conviction expert testimony but ignored the fact that, but for the deficient performance that every federal judge has acknowledged, Dr. Johnson never would have testified and the

jury never would have heard his inaccurate, unreliable, unprofessional, and damaging testimony. If a reviewing court does not eliminate inaccurate and erroneously introduced aggravating evidence that would never have been heard by the jury but for counsel's deficient performance, then the court has not conducted a prejudice review "absent the errors." *Strickland*, 466 U.S. at 695. The Sixth Circuit's failure to consider evidence differing in degree but not kind, prevents the requisite measurement of the distance between post-conviction mitigation evidence and penalty phase evidence on the same subject that included aggravating testimony that would never have been considered had counsel performed adequately.

While this Court has never expressly addressed a case where counsel's deficient performance led to aggravating testimony being introduced during the penalty phase, no reasonable jurist could doubt that the *Strickland* Court meant for both the erroneous omission of mitigating factors and the inclusion of erroneous aggravating evidence to be considered when conducting prejudice analysis. The important distinction lies not in whether the harmful evidence resulted from added aggravation or omitted mitigation, but whether the totality of the evidence—mitigation and aggravation—taken as a whole established that the error(s) had a pervasive effect that undermines confidence in the outcome. *Id.* at 699.

Lest there be any doubt, a look at this Court's handling of *Brady* materiality cases, which gave rise and are identical in nature to the *Strickland* prejudice prong, demonstrates that erroneous aggravating factors should be struck from an evidentiary "reweighing." *See id.* (explaining that the *Strickland* prejudice analysis finds its roots in the *Brady* materiality test). This Court, in *Banks v. Dretke*, eliminated the erroneous testimony of a witness from materiality consideration when the aggravating impact of the witness' statements was the result of the failure of the prosecution to

disclose the witness' identity as a paid informant. *See* 540 U.S. 668, 702 (2004).[9]

In *Hovey*, the Ninth Circuit conducted *Strickland* prejudice prong analysis in a case in which the defense attorney's failure to prepare the key mitigation witness, a medical doctor, led to "devastating" results on cross-examination. 458 F.3d at 930. The Ninth Circuit eliminated the "inaccurate and inconsistent" testimony from consideration before reweighing the evidence because "the jury was left with the erroneous impression that Hovey had never been treated for a mental illness before committing his crimes, that Hovey may have fabricated a mental illness to obtain mercy at sentencing, and that Hovey's psychiatric expert based his conclusions on a substantially incomplete understanding of the facts." *Id.*

By contrast, the Sixth Circuit's *Slaughter* decision, far from eliminating the damaging effects of Dr. Johnson's testimony, cites the doctor's testimony as support for the notion that Mr. Leonard's medical history had already been covered during the penalty phase. Also contrary to the Ninth Circuit in *Hovey*, the *Slaughter* Court failed to consider that Dr. Johnson diagnosed Mr. Jeffrey Leonard despite *never completing a full battery of tests* on him, *improperly* using the Rorschach drawing test as the basis of a mental health diagnosis, and *incorrectly* and *prejudicially* scoring some of his test results.

[9] "Farr's trial testimony was the centerpiece of the Banks prosecution's penalty-phase case. That testimony was cast in large doubt by the declaration Banks ultimately obtained from Farr and introduced in the federal habeas proceeding. Had jurors known of Farr's continuing interest in obtaining Deputy Huff's favor and his receipt of funds to set Banks up, they might well have distrusted Farr's testimony, and, insofar as it was uncorroborated, disregarded it." *Banks*, 540 U.S. at 702.

54

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Supreme Court of the United States

JEFFREY DEVAN LEONARD,

Petitioner,

v.

THOMAS SIMPSON, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE NATIONAL DISABILITY RIGHTS NETWORK, KENTUCKY PROTECTION & ADVOCACY, THE BRAIN INJURY ASSOCIATION OF AMERICA, AND THE BRAIN INJURY ASSOCIATION OF KENTUCKY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CONCLUSION

For the aforementioned reasons, *amicus* Charles Hamilton Houston Institute for Race and Justice urges the Court to grant certiorari.

Respectfully submitted,

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May 3, 2007

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTERESTS OF *AMICI CURIAE*	1
INTRODUCTION	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. TRAUMATIC BRAIN INJURY CAUSES DRAMATIC CHANGES IN COGNITION AND FUNCTIONING THAT MITIGATE A DEFENDANT'S CULPABILITY	3
A. Traumatic Brain Injury Is A Serious Condition With Long-Term Consequences	3
B. Long-Term Effects Of A Traumatic Brain Injury In Childhood Can Be Particularly Devastating, Especially For Children Who, Like Petitioner, Come From Socially Disadvantaged Families	7
C. The Behavioral And Cognitive Disturbances That Result From Traumatic Brain Injury May Lessen An Individual's Criminal Culpability	9
II. JURIES CANNOT BE EXPECTED TO UNDERSTAND THE SIGNIFICANCE OF TRAUMATIC BRAIN INJURY WITHOUT THE ASSISTANCE OF APPROPRIATE EXPERT TESTIMONY BASED ON A COMPREHENSIVE EVALUATION THAT INCLUDES NEUROPSYCHOLOGICAL TESTING	12

TABLE OF CONTENTS – Continued

Page

III. CONFUSION REGARDING THE RELEVANCE OF TRAUMATIC BRAIN INJURY TO THE QUESTION OF MORAL CULPABILITY HAS LED SOME COURTS, INCLUDING THE SIXTH CIRCUIT, TO UNDERVALUE THIS COMPELLING MITIGATING EVIDENCE 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Abdul-Kabir v. Quarterman, 550 U.S. ___, No. 05-11284 (Apr. 25, 2007) 11, 16, 19

Anderson v. Sirmons, 476 F.3d 1131 (10th Cir. 2007) 18

Atkins v. Virginia, 536 U.S. 304 (2002) 10, 17

Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991) 17

Brewer v. Quarterman, 550 U.S. ___, No. 05-11287 (Apr. 25, 2007) 16, 19

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Clark v. Mitchell, 425 F.3d 270 (6th Cir. 2005) 18

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Lockett v. Ohio, 438 U.S. 586 (1978) 16, 19

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Roper v. Simmons, 543 U.S. 551 (2005) 17

Slaughter v. Parker, 187 F. Supp. 2d 755 (W.D. Ky. 2001), *rev'd*, 450 F.3d 224 (6th Cir. 2006) 2, 3, 8, 12

Slaughter v. Parker, 450 F.3d 224 (6th Cir. 2006) 1, 2, 3, 8, 17

Smith v. Tenet Healthsystem SL, Inc., 436 F.3d 879 (8th Cir. 2006) 13

TABLE OF AUTHORITIES – Continued

Page

State v. Coney, 845 So. 2d 120 (Fla. 2003) 15

Strickland v. Washington, 466 U.S. 668 (1984) 3, 15

Tennard v. Dretke, 542 U.S. 274 (2004) 16

Truesdale v. Moore, 142 F.3d 749 (4th Cir.1998) 18

United States v. Bobbitt, 48 C.M.R. 302 (A.F.C.M.R. 1974) 15

United States v. Sandoval-Mendoza, 472 F.3d 645 (9th Cir. 2006) 15

Wiggins v. Smith, 539 U.S. 510 (2003) 16, 19

Williams v. Taylor, 529 U.S. 362 (2000) 19

STATUTES, RULES AND REGULATIONS

Fed. R. Evid. 701 advisory committee's notes (2000 amendments) 13

Traumatic Brain Injury Act of 1996, Pub. L. No. 104-166, 110 Stat. 1445 (1996) 4

20 C.F.R. pt. 404, subpt. P, app. 1 (1989) 15

20 C.F.R. pt. 404, subpt. P, app. 1 (2007) 15

MISCELLANEOUS

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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INTERESTS OF THE *AMICI CURIAE*

Amici National Disability Rights Network, Kentucky Protection & Advocacy, the Brain Injury Association of America, and the Brain Injury Association of Kentucky are organizations devoted to advocating for disabled persons, particularly those who have incurred traumatic brain injury. Amici share an interest in ensuring the criminal justice system accommodates persons with traumatic brain injury by fairly considering their limitations and capacities. Descriptions of the amici are set forth in the Appendix.[1]

INTRODUCTION

Five years old, running across the kitchen floor of a friend's home, Jeffrey Leonard slipped on the linoleum floor and slid across the room, striking his head against the edge of a refrigerator. Sixth Circuit J.A. 516, 548. The blow fractured the child's skull, and opened a gash in his head that bled profusely. *Id.* at 548-49. The child was taken to the emergency room, where the wound was sutured. *Ibid.* No attempt was made, however, to put the portion of the child's skull displaced by the impact back to its normal position. *Id.* at 549. No imaging study was done to determine whether the injury caused a subdural hematoma – bleeding underneath the connective tissue that lines the inside of the skull – which could cause brain damage. *Id.* at 550-51; *see also Slaughter v. Parker*, 450 F.3d 224, 248 (6th Cir. 2006) [hereinafter *Slaughter II*].

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

As an adult, Jeffrey Leonard still bears a visible indentation of his fractured skull. Yet trial counsel "made no effort to obtain an independent psychological evaluation" of his client. *Slaughter II*, 450 F.3d at 234. The only mental health expert to testify at the trial – a state psychologist appointed by the trial court to perform a competency evaluation (*Id.*, 450 F.3d at 229) – conducted no neuropsychological testing. *Slaughter v. Parker*, 187 F. Supp. 2d 755, 840 (W.D. Ky. 2001) [hereinafter *Slaughter I*], *rev'd*, *Slaughter II*, 450 F.3d 224; Sixth Circuit J.A. 316-17, 481-82. And, with respect to Mr. Leonard's childhood injury, the state psychologist testified only that Mr. Leonard "did volunteer that he had once been hit on the head once in some sort of a physical altercation and had [l]ost consciousness for some period of time." Sixth Circuit J.A. 326.

The jury that sentenced Jeffrey Leonard to death had no reason to believe that beyond the visible scar, this childhood injury had lifelong implications. Subsequently, Dr. Eric Engum, a clinical psychologist, administered a battery of neuropsychological tests and diagnosed Jeffrey Leonard with cognitive deficits resulting from a traumatic brain injury. *Slaughter I*, 187 F. Supp. 2d at 840; Sixth Circuit J.A. 372-73.

SUMMARY OF ARGUMENT

Traumatic brain injury (TBI) is a disability that can be accompanied by dramatic changes in cognition and functioning. Evidence of TBI is centrally relevant to assessing a defendant's personal culpability. Jurors in capital cases are likely to accord mitigating weight to evidence of TBI supported by properly presented expert testimony and appropriate diagnostic testing. Yet the lower courts, including the Sixth Circuit, have struggled to determine whether failure to introduce evidence of traumatic brain injury undermines confidence in a death

sentence. The Sixth Circuit's decision here exemplifies this confusion. Despite counsel's deficient failure to obtain and present independent expert testimony,[2] the Sixth Circuit refused to find prejudice,[3] characterizing Dr. Engum's evaluation of Mr. Leonard as "largely the same" as that presented by Dr. Johnson. *Slaughter II*, 450 F.3d at 235. Amici urge this Court to grant the Petition because the Sixth Circuit's test creates a barrier to the full consideration of mitigating evidence in a capital case, permits the undervaluing of traumatic brain injury evidence, and runs contrary to this Court's longstanding precedents.

ARGUMENT

I. TRAUMATIC BRAIN INJURY CAUSES DRAMATIC CHANGES IN COGNITION AND FUNCTIONING THAT MITIGATE A DEFENDANT'S CULPABILITY.

A. Traumatic Brain Injury Is A Serious Condition With Long-Term Consequences.

Traumatic brain injury occurs when an external event inflicts trauma on the brain. TBI can result in significant impairment of an individual's physical, cognitive and psychosocial functioning.[4]

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[2] The district court and court of appeals agreed that trial counsel's performance was deficient. *Slaughter I*, 187 F. Supp. 2d at 839-41; *Slaughter II*, 450 F.3d at 233-34.

[3] To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

[4] *See* National Institutes of Health, Consensus Development Panel, *Rehabilitation of Persons with Traumatic Brain Injury*, 282 J. Amer. Med. Ass'n 974, 974 (1999) [hereinafter NIH].

The impact of TBI is rarely confined to a specific set of symptoms, clearly delineated impairments, or a disability that only affects one part of a person's life. Instead, "the consequences of TBI often influence human functions along a continuum from altered physiological functions of cells through neurological and psychological impairments, to medical problems and disabilities that affect the individual with TBI, as well as the family, friends, community, and society in general."[5] In many cases, the consequences of TBI endure throughout an individual's life, with new problems likely to occur as a result of new challenges and the aging process.[6] Problems – even following mild TBI – are persistent and can be lifelong.[7]

Pursuant to the Traumatic Brain Injury Act of 1996, Pub. L. No. 104-166, 110 Stat. 1445 (1996) (codified as amended at 42 U.S.C.A. § 280b-1b), the National Institutes of Health (NIH) published a number of consensus statements, including one on the consequences of TBI.[8] In its consensus statement, a comprehensive compilation of decades of research, the NIH broke down the categories of consequences as follows:

Neurological consequences: "The neurological consequences of TBI are many and complex, occurring throughout the neural axis. Any sensory, motor and autonomic

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[5] *Id.* at 976; *see also* Clark Watts, *Brain-injured Patients, in Legal Medicine* 412, 413 (5th ed. 2001) ("Rarely the [brain-injured] patient has a single symptom; more often there is a constellation of symptoms.").

[6] NIH, *supra* note 4, at 976.

[7] *See, e.g.*, Carol A. Hawley, *Reported Problems and Their Resolution Following Mild, Moderate and Severe Traumatic Brain Injury Amongst Children and Adolescents in the UK*, 17 Brain Inj. 105 (2003); Jean A. Langlois et al., *The Epidemiology and Impact of Traumatic Brain Injury*, 21 J. Head Trauma Rehab. 375, 376 (2006).

[8] NIH, *supra* note 4, at 976.

function may be compromised. Most of these complications are apparent within the first days or months following injury, depending on the severity of the initial trauma. Some long-term sequelae include a variety of movement disorders, seizures, headaches, ambient visual deficits, and sleep disorders."[9]

Cognitive consequences: "The cognitive consequences of TBI are similarly broad. All of these consequences can occur singly or in combinations and are variable in terms of their effects on individuals; furthermore, they change in severity and presentation over time. In combination, they produce a myriad of functional problems. Some of the most persistent problems include memory impairment and difficulties in attention and concentration. Deficits in language use and visual perception are common, but often unrecognized. Frontal lobe functions, such as the executive skills of problem solving, abstract reasoning, insight, judgment, planning, information processing, and organization, are vulnerable to TBI."[10]

Behavioral deficits: "Common behavioral deficits include decreased ability to initiate responses, verbal and physical aggression, agitation, learning difficulties, shallow self-awareness, altered sexual functioning, impulsivity, and social disinhibition. Mood disorders, personality changes, altered emotional control, depression, and anxiety are also prevalent after TBI."[11]

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[9] *Ibid.*

[10] *Ibid. See also* Janiece Lord-Maes & John E. Obrzut, *Neuropsychological Consequences of Traumatic Brain Injury in Children and Adolescents*, 29 J. Learning Disabilities 609, 615 (1996) (listing a variety of neuropsychological deficits, including attentional dysfunction, memory impairment, language impairment, auditory processing deficits, and evidence of frontal lobe dysfunction as commonly reported in individuals with TBI).

[11] NIH, *supra* note 4, at 976.

Social consequences: "Social consequences of mild, moderate, and severe TBI are many and serious, including increased risk of suicide, divorce, chronic unemployment, economic strain, and substance abuse. . . . As individuals with TBI attempt to resume their usual daily activities, the environment places increasing demands on them, uncovering additional psychosocial consequences."[12]

Although traumatic brain injuries can have permanent and far-reaching effects on an individual, rehabilitative interventions with brain-injured individuals can achieve substantial success. Studies have demonstrated that even very late assessment and intervention that takes into account the nature of injury and developmental stage at the time of the traumatic brain injury can positively affect functioning and quality of life.[13] With treatment, even severe traumatic brain injury can result in a good recovery for a patient.[14] Although TBI victims who do not receive early rehabilitation services are at greater risk of developing a range of disorders (e.g., severe depression and anxiety, substance abuse disorders, and difficulty controlling anger), post-acute TBI rehabilitation programs provided even years after the injury can successfully treat these later-developing problems.[15]

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[12] *Id.* at 976-77.

[13] *See, e.g.*, Lisa A. Brenner et al., *The Long-term Impact and Rehabilitation of Pediatric Traumatic Brain Injury: A 50-Year Follow-Up Case Study*, 22 J. Head Trauma Rehab. 56, 58-63 (2007) (documenting the successful rehabilitative intervention with a fifty-six year old man who suffered a childhood TBI at age five and received no medical treatment besides a brief post-injury hospital visit).

[14] *See* Ilmari Asikainen, Markku Kaste & Seppo Sarna, *Predicting Late Outcome for Patients with Traumatic Brain Injury Referred to a Rehabilitation Programme: A Study of 508 Finnish Patients 5 Years or More After Injury*, 12 Brain Inj. 95, 105 (1998).

[15] Centers for Disease Control and Prevention, Traumatic Brain Injury (TBI) in Prisons and Jails: An Unrecognized Problem, http://

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B. Long-Term Effects Of A Traumatic Brain Injury In Childhood Can Be Particularly Devastating, Especially For Children Who, Like Petitioner, Come From Socially Disadvantaged Families.

Because of the brain's explosive rate of development and organization in a child's first years, childhood brain injuries can have extraordinary and enduring effects. That a child's brain is still developing increases its vulnerability to external harms and means children can be more vulnerable to the impact of TBI than adults.[16] One study has shown that children who, like Petitioner, sustained brain injuries at age seven or younger had fewer good recoveries than patients ranging in age from eight to forty.[17] Long-term follow-up of children with TBI indicates that problems persist and may even worsen over time, depending on the nature and severity of the injury as well as developmental and environmental factors.[18]

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www.cdc.gov/ncipc/tbi/FactSheets/Prisoner_TBI_Prof.pdf (last visited Apr. 30, 2007).

[16] *See* Vicki Anderson & Cathy Catroppa, *Advances in Postacute Rehabilitation After Childhood-Acquired Brain Injury*, 85 Am. J. Phys. Med. Rehab. 767, 768 (2006) ("[W]hen skills are undeveloped or immature at the time of injury, resultant deficits may be more global and devastating for children."); Vicki Anderson et al., *Understanding Predictors of Functional Recovery and Outcome 30 Months Following Early Childhood Head Injury*, 20 Neuropsychology 42, 55 (2006) ("[C]hildren sustaining injuries in early childhood exhibit deficits similar to, if not persistent than, those seen in older children and adults, providing little support for the presence of functional plasticity in the developing brain.").

[17] Asikainen et al., *supra* note 14, at 104.

[18] Anderson & Catroppa, *supra* note 16, at 768; *see also* Harry Klonoff et al., *Outcome of Head Injuries From Childhood to Adulthood: A Twenty-Three Year Follow-up Study, in Traumatic Head Injury in Children* 219, 229-31 (1995) (documenting the enduring symptoms of pediatric TBI, even after mild TBI).

A brain injury suffered early in life can disrupt a child's ability to acquire skills and competencies later in life. The nature and degree of the resulting deficits are correlated with the age when the brain injury occurred. Thus, a child injured at the end of his preschool years (between ages three and six) is most likely to have difficulty with higher level thinking abilities called executive functions: capacities such as initiation, working memory, planning, organization, self-monitoring, and judgment.[19]

A child's physical recovery from TBI can create the expectation of adequate cognitive and behavioral functioning. However, a normal physical appearance can mask underlying cognitive deficits.[20] Poor social functioning and persistent emotive and behavioral disturbances are particularly prevalent among individuals who suffered childhood TBI, even among those with no serious long-term physical functioning deficits.[21] These problems were similar across children with mild, moderate and severe TBI, and did not resolve over time.[22]

Children who come from socially disadvantaged families, like Petitioner,[23] can experience poorer outcomes in recovery from TBI than children from more affluent

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[19] Brenner et al., *supra* note 13, at 57.

[20] *See* Lord-Maes & Obrzut, *supra* note 10, at 609.

[21] *See* Rafaella Cattelani et al., *Traumatic Brain Injury in Childhood: Intellectual, Behavioural and Social Outcome into Adulthood*, 12 Brain Inj. 283 (1998).

[22] Hawley, *supra* note 7, at 125.

[23] *See Slaughter I*, 187 F. Supp. 2d at 775-76 (detailing Petitioner's impoverished childhood and recounting testimony of Petitioner's mother that family "lacked the money to pay for follow-up medical treatment" for Petitioner's childhood injury); *Slaughter II*, 450 F.3d at 235 (noting evidence that "Slaughter was abandoned by his father, abused by his mother and step-father, and frequently left in charge of his siblings.").

backgrounds.[24] In one study, family environment (measured by variables reflecting socioeconomic status, family functioning, family stressors and resources) accounted for 25% of the variance in the level of outcome, as compared to the severity of the TBI which accounted for 20% of the variance.[25] The study suggests that injury-related variables are important influences on the rate of recovery during the first year after a TBI, but that the eventual level of cognitive and behavioral functioning attained depends as much, if not more, on environmental factors.[26]

C. The Behavioral And Cognitive Disturbances That Result From Traumatic Brain Injury May Lessen An Individual's Criminal Culpability.

Personality change is a relatively common complication of brain trauma in children that can frequently result in behavioral problems in adulthood.[27] The American Psychiatric Association describes five major subtypes of personality change due to TBI: affective lability (unstable emotions), aggression, disinhibition, apathy, and paranoia.[28] Among a sample of subjects incurring TBI in

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[24] Anderson & Catroppa, *supra* note 16, at 769.

[25] Keith Owen Yeates et al., *Preinjury Family Environment as a Determinant of Recovery from Traumatic Brain Injuries in School-age Children*, 3 J. Int'l Neuropsychological Soc'y 617, 626 (1997).

[26] *Id.* at 627; *see also* Keith Owen Yeates et al., *Short- and Long-term Social Outcomes Following Pediatric Traumatic Brain Injury*, 10 J. Int'l Neuropsychological Soc'y 412, 421 (2004) (documenting the effects of family environments on social outcomes).

[27] *See* Jeffrey E. Max et al., *Predictors of Personality Change Due to Traumatic Brain Injury in Children and Adolescents Six to Twenty-four Months After Injury*, 18 J. Neuropsychiatry & Clinical Neurosciences 21, 30 (2006).

[28] *Id.* at 22 (citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed., 2000)).

childhood, the labile subtype occurred in 49% of subjects, the aggressive subtype and the disinhibited subtype each occurred in 38%, apathy occurred in 14% of subjects and paranoia in 5% of subjects.[29]

Given the coexistence of these subtypes, personality changes can frequently lead to behavioral disturbances involving a loss of impulse control, spontaneous aggression, and dysphoric bipolar states.[30] These profound changes can result in destructive behavior, including criminality and substance abuse.[31]

The impairments caused by TBI are comparable in kind, if not always in degree, to those recognized in *Atkins v. Virginia*, 536 U.S. 304 (2002), as lessening a defendant's culpability. In *Atkins*, the Court identified mentally retarded individuals' "disabilities in areas of reasoning, judgment, and control of their impulses" as diminishing their moral culpability. *Id.* at 306. Recognizing that many individuals with traumatic brain injuries may have similarly lessened culpability, the American Bar

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[29] Jeffrey E. Max et al., *The Phenomenology of Personality Change Due to Traumatic Brain Injury in Children and Adolescents*, 13 J. Neuropsychiatry & Clinical Neurosciences 161, 164-65 (2001).

[30] Edward Kim, *Agitation, Aggression, and Disinhibition Syndromes After Traumatic Brain Injury*, 17 NeuroRehabilitation 297, 297 (2002); *see also* Max, *supra* note 29, at 164 (reporting, inter alia, increased aggressivity and impaired social judgment in approximately 40% of children with TBI studied); F. Gerald Moeller et al., *Psychiatric Aspects of Impulsivity*, 158 Am. J. Psychiatry 1783, 1785 (2001) ("[R]esearch has supported the idea that damage to the frontal cortex is a cause of at least some aspects of impulsivity.").

[31] *See* Wayne A. Gordon et al., *Traumatic Brain Injury Rehabilitation: State of the Science*, 85 Amer. J. Physical Med. & Rehab. 343, 372 (2006) ("[E]vidence suggests that TBI is associated with increased psychopathology, particularly in the areas of mood and anxiety disorders, and impulsive or destructive behaviors, such as aggression and substance abuse."); Ricardo E. Jorge et al., *Alcohol Misuse and Mood Disorders Following Traumatic Brain Injury*, 62 Archives Gen. Psychiatry 742 (2006).

Association urged the extension of *Atkins*'s reasoning to those who suffer "significant limitations in both their intellectual functioning and adaptive behavior" as a result of traumatic brain injury.[32] Both the American Psychological Association and the American Psychiatric Association endorsed similarly worded resolutions.[33] Embodied in these resolutions is a recognition that TBI is a disability "very similar to mental retardation in [its] impact on intellectual and adaptive functioning"[34] as well as culpability.[35]

Amici do not call for a wholesale exclusion from the death penalty for those who have suffered TBI, because the limitations brought on by TBI are varied in kind and in degree. Amici do urge judicial recognition that TBI lessens culpability to a degree commensurate with the cognitive and functioning impairments it causes.[36]

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[32] American Bar Association, Resolution 122A, *available at* http://www.abanet.org/leadership/2006/annual/onehundredtwentytwoa.doc (last visited Apr. 30, 2007).

[33] *Id.* at 3 nn. 2-3.

[34] *Id.* at 5.

[35] Ronald J. Tabak, *Executing People with Mental Disabilities: How We Can Mitigate an Aggravating Situation*, 25 St. Louis U. Pub. L. Rev. 283, 288 (2006) ("The part of the Court's reasoning in *Atkins* and *Roper* dealing with moral culpability is equally true for those seriously mentally disabled people who would be exempted from the death penalty by paragraphs one and two of the Task Force's proposal."); *see also* Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 Cath. U. L. Rev. 1133, 1137 (2005) ("People with significant mental disorder[s] at the time of the offense may often be culpable enough to deserve conviction for murder, but they are never as culpable as the consummately evil killer envisioned by the Supreme Court's death penalty jurisprudence.").

[36] The Court has recognized that mitigating evidence may vary in persuasiveness and yet still must be given meaningful consideration by the sentencing jury. *See Abdul-Kabir v. Quarterman*, 550 U.S. __, No. 05-11284, slip op. at 15 (Apr. 25, 2007) ("Cole's mitigating evidence

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II. JURIES CANNOT BE EXPECTED TO UNDERSTAND THE SIGNIFICANCE OF TRAUMATIC BRAIN INJURY WITHOUT THE ASSISTANCE OF APPROPRIATE EXPERT TESTIMONY BASED ON A COMPREHENSIVE EVALUATION THAT INCLUDES NEUROPSYCHOLOGICAL TESTING.

In this case, the jury was denied evidence that would have allowed it to understand the complex cognitive impairments caused by Jeffrey Leonard's childhood TBI. Instead, the jury heard from Dr. Johnson, a psychologist who conducted no neuropsychological testing. *Slaughter I*, 187 F. Supp. 2d at 840; Sixth Circuit J.A. 316-17, 481-82. And, to the extent he mentioned the brain injury, he did so only in a passing reference to the defendant's self-report of having been "hit on the head." Sixth Circuit J.A. 326. In view of Dr. Johnson's testimony, the jury likely concluded the defendant's being "hit on the head" was inconsequential. A jury receiving appropriate expert testimony would likely have recognized the TBI as lessening Jeffrey Leonard's culpability and imposed a sentence less than death.[37]

The mechanisms and consequences of TBI are beyond the common knowledge of the average layperson. Expert

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[which included evidence of 'possible neurological damage' and 'lack of self-control'] may not have been as persuasive as Penry's * * * [but] it was relevant to the question of Cole's moral culpability for precisely the same reason as Penry's * * * .") (citing *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

[37] The American public recognizes the severity of the disabilities caused by brain injuries. Almost 70% of adults think that a brain injury is a "very serious" disability and more than nine out of ten (94%) think it is at least a "somewhat serious" disability. Harris Poll, Public Perceptions of Brain and Head Injuries (2000), www.biausa.org/Pages/harris_poll_results.html.

testimony is necessary to show a jury what cognitive or functional impairments have been caused by a brain injury.[38] TBI not only demands a "highly scientific technique for diagnosis," *Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 888 (8th Cir. 2006), but also presents complex issues of causation. *See* Fed. R. Evid. 701 advisory committee's notes (2000 amendments) ("[L]ay testimony 'results from a process of reasoning familiar in everyday life,' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.'").

While some critical information surrounding TBI and its effects can only be obtained from the patient, a proper evaluation should not rely solely on the patient's subjective report.[39] "Because of problems with motivation, memory, language, reduced awareness of their illness, or other neurobehavioral symptoms, patients may not always be reliable informants for past or current events."[40] Brain-injured patients often suffer from language disorders, or

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[38] *See* Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 Am. U. L. Rev. 51, 75 & n.158 (2006) (noting that courts generally admit expert testimony concerning frontal lobe dysfunction).

[39] *See generally* Laura A. Flashman & Thomas W. McAllister, *Lack of Awareness and Its Impact in Traumatic Brain Injury*, 17 NeuroRehabilitation 285 (2002) (discussing reasons why the brain-injured patient may be unaware of the consequences of TBI, and surveying the literature).

[40] American Academy of Clinical Neuropsychology, *Practice Guidelines for Neuropsychological Assessment and Consultation*, 21 Clinical Neuropsychologist 209, 219 (2007) [hereinafter AACN]; *see also* Redding, *supra* note 38, at 119 (many TBI victims "fail to disclose any symptoms or that they had suffered a head injury" or "tend to present an unrealistically favorable image of themselves."); *id.* at 120 ("[T]hose with FLD [frontal lobe dysfunction] often fail to report any symptoms.").

aphasias, that may render the patient unable to express herself or unable to process communication input.[41]

For these reasons, a comprehensive evaluation should include: interviews of significant others of the patient;[42] a review of available records, such as medical and school records;[43] neuroimaging studies;[44] and, most importantly, neuropsychological testing.[45] The central component of a comprehensive evaluation of brain injury is the administration of neuropsychological tests which have been determined to be internally reliable, valid as compared to other measures of brain impairment,[46] and normatively stable across varying patient populations.[47]

One widely used battery of neuropsychological tests used to determine cognitive impairment in functioning is the Halstead-Reitan Neuropsychological Battery (HRNB),

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[41] Watts, *supra* note 5, at 412-13.

[42] AACN, *supra* note 40, at 219-20.

[43] *Id.* at 218-19.

[44] *Id.* at 224-25 (citing American Psychological Association, *Official Position of the Division of Clinical Neuropsychology (APA division 40) on the Role of Neuropsychologists in Clinical Use of fMRI*, 18 Clinical Neuropsychologist 349 (2004)).

[45] *Id.* at 220-21; *see also* Redding, *supra* note 38, at 120 ("[A] competent assessment for FLD [frontal lobe dysfunction] will include a collection of past medical and behavioral history and collateral source information, a psychiatric or neurological examination, neuropsychological testing, and perhaps electroencephalography ('EEG') or neuroimaging.").

[46] Shane S. Bush et al., *Symptom Validity Testing: Practice Issues and Medical Necessity*, 20 Archives of Clinical Neuropsychology 419 (2005).

[47] AACN, *supra* note 40, at 220; *see* Lord-Maes & Obrzut, *supra* note 10, at 615 (stating that cognitive dysfunction following TBI may fail to show up on routine intellectual assessments – only neuropsychological testing will reveal many of the deficits common in individuals with TBI).

which was administered to Jeffrey Leonard by Dr. Eric Engum, an expert who testified in state postconviction proceedings. Interest in investigating brain damage in returning World War II veterans spurred development of the HRNB, which has long been recognized as a reliable and valid measure of brain impairment.[48]

Courts have recognized that proper expert testimony, prepared in accordance with the foregoing principles, is essential in proving brain damage.[49] Because Dr. Johnson conducted no neuropsychological testing whatsoever, the

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[48] Lawrence C. Hartlage, *Neuropsychological Testing of Adults: Further Considerations for Neurologists*, 16 Archives of Clinical Neuropsychology, 201, 202-05 (2001). The HRNB was relied on by courts as early as 1974. *See United States v. Bobbitt*, 48 C.M.R. 302, 303-04 & n.2 (A.F.C.M.R. 1974) (reversing conviction based in part on testimony of psychologist, having administered HRNB, that defendant suffered "cerebral dysfunction"). The HRNB has been accepted as a reliable measure by the Social Security Administration, which in 1989 recognized that "[b]road-based neuropsychological assessments using, for example, the Halstead-Reitan or the Luria-Nebraska batteries may be useful in determining brain function deficiencies, particularly in cases involving subtle findings such as may be seen in traumatic brain injury." 20 C.F.R. pt. 404, subpt. P, app. 1, § 12.00D (1989). Present regulations provide that "comprehensive neuropsychological examinations may be used to establish the existence and extent of compromise of brain function" 20 C.F.R. pt. 404, subpt. P, app. 1, §§ 12.00D; 12.00D(8) (2007).

[49] *E.g. United States v. Sandoval-Mendoza*, 472 F.3d 645, 652-56 (9th Cir. 2006) (holding that the district court improperly excluded expert testimony of neurologist and psychologist as to cognitive impairment caused by brain tumor); *see also Hutchison v. State*, 150 S.W.3d 292, 304-08 (Mo. 2004), *cert. denied sub nom. Hutchison v. Missouri*, 126 S. Ct. 72 (2005) (holding that although trial counsel obtained a mental health expert, the failure to adequately utilize the expert with respect to, inter alia, the defendant's brain damage, violated both prongs of the *Strickland* test); *State v. Coney*, 845 So. 2d 120, 131-32 (Fla. 2003) (concluding that "it is likely that a jury would have been persuaded to recommend a penalty other than death" if neuropsychological evidence had been presented about defendant's brain dysfunction).

jury had no opportunity to learn the full truth about Jeffrey Leonard's brain injury and subsequent impairments.

III. CONFUSION REGARDING THE RELEVANCE OF TRAUMATIC BRAIN INJURY TO THE QUESTION OF MORAL CULPABILITY HAS LED SOME COURTS, INCLUDING THE SIXTH CIRCUIT, TO UNDERVALUE THIS COMPELLING MITIGATING EVIDENCE.

Central to the Eighth Amendment's protection in capital cases is the opportunity for jurors to weigh mitigating evidence, enabling them to evaluate the appropriateness of imposing the death penalty. Without the chance to consider such evidence, there is an unacceptable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). *See also Brewer v. Quarterman*, 550 U.S. ___, No. 05-11287 (Apr. 25, 2007) (holding that a capital jury must be permitted to weigh all relevant mitigating evidence in its calculus of deciding whether a defendant is truly deserving of death). Evidence of TBI is particularly relevant because it affects any assessment of personal culpability, and this Court's death penalty jurisprudence has illustrated an increasing understanding that impaired brain functioning is particularly mitigating. *See Abdul-Kabir v. Quarterman*, 550 U.S. ___, No. 05-11284, slip op. at 10 (Apr. 25, 2007) (holding that "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty," such as evidence of neurological damage); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (finding that "impaired intellectual functioning is inherently mitigating"); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (recognizing that diminished mental capacities are relevant in mitigation); *Penry v. Lynaugh*, 492 U.S.

302, 337 (1989) (noting that "virtually all of the States with death penalty statutes that list statutory mitigating factors include as a mitigating circumstance evidence that '[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.'"). In addition, in the recent cases of *Atkins v. Virginia*, 536 U.S. 304, 318 (2002), and *Roper v. Simmons*, 543 U.S. 551, 567 (2005), the role of brain development and mental functioning were critical to the Court's decision to exclude the mentally retarded and juveniles from the death penalty.

The jury that sentenced Jeffrey Leonard to death heard no evidence of his brain injury. Yet, the Sixth Circuit found no prejudice, creating a barrier to consideration of this compelling mitigating evidence by characterizing the postconviction testimony about Mr. Leonard's brain injury and its consequences, as "largely the same" as the trial testimony of Dr. Johnson. *Slaughter II,* 450 F.3d at 235.

The Sixth Circuit's approach is emblematic of the confusion that prevails in the lower courts as to whether counsel's deficient failure to present brain injury evidence undermines confidence in a death sentence. Some courts have held counsel's failure to present evidence of brain damage is prejudicial. *See Brewer v. Aiken*, 935 F.2d 850, 858 (7th Cir. 1991) (finding prejudice as a result of counsel's failure to present evidence of defendant's brain damage arguing that had the jury been presented with this evidence, "it might well have decided that . . . [defendant] was simply not the type of individual, because of his impaired mental capacity, who deserved the death sentence"); *Frierson v. Woodford*, 463 F.3d 982, 994 (9th Cir. 2006) (recognizing the mitigating impact that evidence of brain damage has on juries' appraisal of moral culpability); *Caro v. Woodford*, 280 F.3d 1247, 1257 (9th Cir. 2002) (concluding that evidence of defendant's brain damage

"was relevant mitigating information and should have been explained to and considered by the sentencing jury; the omission of this evidence renders [defendant's] death sentence unreliable"); *Anderson v. Sirmons*, 476 F.3d 1131, 1148 (10th Cir. 2007) (holding that evidence of a defendant's brain injury is highly relevant to the question of moral culpability and that "the absence of this readily available mitigation evidence left the jury with a 'pitifully incomplete' picture of the defendant," prejudicing the outcome of the trial).

By contrast, other courts have, like the Sixth Circuit, overlooked the importance of this compelling mitigating evidence. Insufficient understanding of the long-term consequences traumatic brain injury has on a defendant's neurological, cognitive, behavioral and social functioning has led some courts to conclude that failure to present available evidence of TBI does not undermine confidence in a sentence recommendation. *See Truesdale v. Moore*, 142 F.3d 749, 754-55 (4th Cir. 1998) (finding no prejudice for failure to present evidence of defendant's organic brain dysfunction); *Mathis v. Dretke*, 124 Fed. Appx. 865, 882 (5th Cir.), *cert. denied*, 125 S. Ct. 2940 (2005) (finding no prejudice from failure to introduce evidence of defendant's frontal lobe damage because counsel had presented evidence with the same "mitigating thrust"); *Clark v. Mitchell*, 425 F.3d 270, 287 (6th Cir. 2005) (holding that failure to introduce expert evidence about defendant's organic brain damage did not prejudice the outcome because expert testimony did not "significantly expand upon the information that was available to the jury"); *People v. Peeples*, 205 Ill. 2d 480, 546-51 (2002) (holding counsel rendered deficient performance for failing to present evidence of defendant's cognitive impairments due to brain injury, but jury might have viewed such evidence as establishing future dangerousness).

Evidence of a defendant's brain damage can radically change the picture of a case. Such evidence is necessary for a jury to possess the fullest information possible concerning the defendant's character and is essential to determining the appropriate sentence. *See Lockett*, 438 U.S. at 603. In *Abdul-Kabir*, this Court held the Eighth Amendment was violated when a jury heard mitigating evidence including evidence of "possible neurological damage," but the trial court's instructions were insufficient to permit the jury to give "meaningful consideration" to that evidence. Slip op. at 18. Jeffrey Leonard's case – where the jury did *not* hear evidence of his TBI, and the Sixth Circuit erected a barrier to "meaningful consideration" of that evidence in weighing the prejudice caused by his counsel's deficient performance – is no less offensive to the Constitution. Just as a capital jury must be permitted to "weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death," *Brewer*, slip op. at 6, so must a court on collateral review weigh such evidence in determining whether counsel's deficient failure to present such evidence to the jury undermines confidence in the outcome. *Wiggins*, 539 U.S. at 536 ("[W]e evaluate the totality of the evidence – 'both that adduced at trial, *and the evidence adduced in the habeas proceeding*[s].'") (citing *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)). Hence, any judicial test that, like the Sixth Circuit's here, allows courts to sanction the exclusion of evidence of a defendant's brain injury does not comport with this Court's jurisprudence or the Eighth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX: DESCRIPTIONS OF THE *AMICI CURIAE*

The National Disability Rights Network (NDRN)

The National Disability Rights Network ("NDRN") and its predecessor organization (the National Association of Protection and Advocacy Systems (NAPAS)) have appeared before the Court as *amicus curiae* in numerous cases. NDRN is the membership association of protection and advocacy ("P&A") agencies that are located in all 50 states. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities, including those with traumatic brain injury (TBI). The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. Congress recognized the need to ensure that the P&A agencies have the resources to address the problems associated with TBI when it reauthorized the Traumatic Brain Injury Act as part of the Children's Health Act of 2000 (Pub. L. No. 106-310) and included the Protection and Advocacy for Individuals with Traumatic Brain Injury (PATBI) program. TBI has become a pressing concern for NDRN as the P&A agencies anticipate serving an increasing number of individuals with TBI as a result of the military war in Iraq.

Kentucky Protection and Advocacy

Kentucky Protection and Advocacy (P&A) is an independent state agency that is part of the nationwide, federally mandated protection and advocacy system for individuals with disabilities. Kentucky P&A uses legally based individual and systemic advocacy to promote and

protect the rights of individuals with disabilities, including individuals with brain injuries. In 2006, P&A appeared before the Court as an amicus curiae in *Winkelman v. Parma City School District,* No. 05-983, joining other amici including NDRN. Kentucky P&A receives a PATBI grant to provide information, referrals, and advice; individual and family advocacy; legal representation; and specific assistance in self-advocacy to Kentuckians affected by brain injury. 42 U.S.C. § 300d-53(b). In fiscal year 2006, Kentucky P&A handled information and referral calls about brain injury laws, programs and rights, provided trainings about brain injury, and represented individuals with brain injuries in a variety of lawsuits. Kentucky P&A conducted outreach to various minority populations, collaborated with the Brain Injury Association of Kentucky (BIAK), and made a presentation to the Joint Executive Committee on Veterans Organizations (JEVCO) of Kentucky. In 2006, Kentucky P&A testified to a state legislative committee and currently is commenting on Kentucky's Medicaid application for its Traumatic Brain Injury waiver program.

The Brain Injury Association of America (BIAA)

The Brain Injury Association of America (BIAA), founded in 1980, is the only nationwide advocacy organization serving and representing the 1.4 million individuals who sustain a traumatic brain injury (TBI) each year. The mission of the Brain Injury Association of America is to create a better future through brain injury prevention, research, education and advocacy. Each year, BIAA and its nationwide network of state affiliates answer 100,000 individual requests for information about TBI. In addition to its legislative advocacy efforts, BIAA participates in

litigation and has appeared before the Court as *amicus curiae* on many occasions, including joining NDRN or NAPAS as *amici curiae* in several cases.

The Brain Injury Association of Kentucky (BIAK)

Since 1986, the Brain Injury Association of Kentucky (BIAK), a chartered state affiliate of the Brain Injury Association of America (BIAA) and a member of the North American Brain Injury Society, serves Kentuckians affected by brain injury through advocacy, education, prevention, research, and support. BIAK advocates within the criminal justice system to find appropriate non-custodial placements for brain-injured defendants. BIAK has recently formed a special task force to prepare for the number of soldiers returning to Kentucky from the Iraq and Afghanistan conflicts with head injuries.